



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

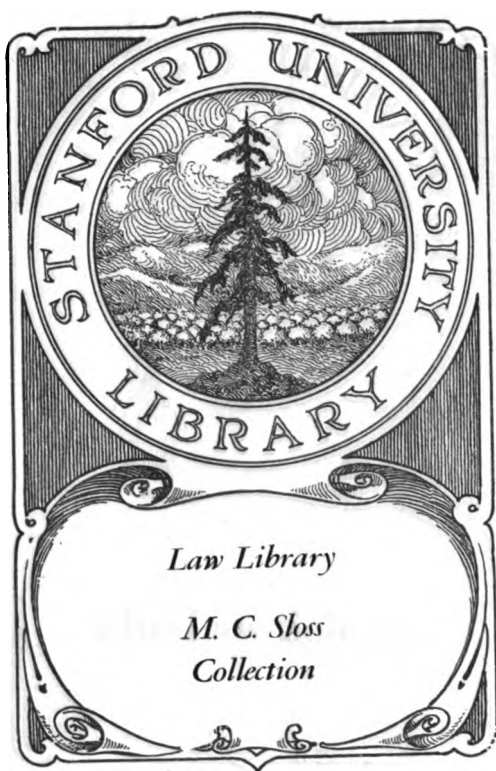
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE SOUTH AUSTRALIAN LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

3056

SUPREME COURT OF SOUTH AUSTRALIA.

EDITED BY

J. W. DOWNER,

A PRACTITIONER OF THE SUPREME COURT.

VOL. VIII.—1874.

ADELAIDE:

ANDREWS, THOMAS, & CLARK, PRINTERS,
GRENFELL STREET.

1875.

L28213

MAR 22 1947

YRABBU GORUAY

JUDGES OF THE SUPREME COURT.

1874.

SIR RICHARD DAVIES HANSON CHIEF JUSTICE.

EDWARD CASTRES GWYNNE, ESQ. SECOND JUDGE.

WILLIAM ALFRED WEARING, ESQ. THIRD JUDGE.

Primary Judge in Equity:

EDWARD CASTRES GWYNNE, ESQ.

INDEX OF CASES REPORTED.

	Page
Andrews, Palmer v.	281
Brady v. Brady	219
Bridgart v. Grooves	277
Buckett v. Knobbe	86
Burnett, Tothill v.	75
Burra Railway Act, Lands Clauses Consolidation and <i>In re</i> Masters	54
Cherry v. Fuller	113
Davies v. Jones	127
District Council of Glanville, <i>In re Ex parte</i> Strangways	38
District Council of Glanville, <i>In re Ex parte</i> Hindmarsh	255
Dolahan, Moore v.	77
Fischer, <i>In re</i>	57
Fuller, Cherry v.	113
Golden Reef Mining Company, Limited, and the Companies Act, 1864, <i>In re, Ex parte</i> Ward	241
Grooves Bridgart v.	277
Hindmarsh <i>Ex parte, In re</i> The District Council of Glanville	255
Hodgson v. Orr	273
Jones, Davies v.	127
Juriet, Tumbling Waters Company v.	131
Kapunda United Tradesmen's Company, <i>In re</i>	55
King, Miles v.	202
Knobbe, Buckett v.	86

	Page.
Lands Clauses Consolidation and The Burra Railway Act, 1869, <i>In re</i> Masters	54
Lean v. Maurice	119
Levi, <i>In re</i>	144
Lord, Tranter v.	81
Masters, <i>In re</i> , and Lands Clauses Consolidation and the Burra Railway Act, 1869	54
Mattawarrangala Company, <i>In re</i>	137
Maurice, Lean v.	119
Miles v. King	202
Moore v. Dolahan	77
Orr, Hodgson v.	273
Palmer v. Andrews	282
Regina v. Townsend	72
Stanley, <i>In re</i>	53
Strangways <i>Ex parte</i> , <i>In re</i> The District Council of Glanville	38
Talisker Mining Company, <i>In re</i>	289
Taylor, White v.	1
Tothill v. Burnett	75
Townsend, Regina v.	72
Tranter v. Lord	81
Tumbling Waters Company v. Juriet	131
Wadham, Yam Creek Gold Mining Company v.	141
Ward <i>Ex parte</i> , <i>In re</i> The Companies' Act, 1864, and the Golden Reef Mining Company, Limited	241
West, <i>In re</i>	84
White v. Taylor	1
Whittaker, <i>In re</i>	45
Winn's Gold Mining Company v. Wyld	66
Wyld, Winn's Gold Mining Company	66
Yam Creek Gold Mining Company v. Wadham	141

TABLE OF CASES CITED

IN THIS VOLUME.

	Page.		Page.
Abbott, Gale v.	223	Bowles, Jones v.	228
Adam, Page v.	239	Bray v. Macdonald	222, 224
Alcock, Robinson v.	122	Bright v. Walker	11
Alexander, Hart v.	184	British Columbia Sawmill Co. v. Nettleship.	214
Anglo-Egyptian Navigation Dracachi Co., v.	129	Brooksbank, Smith v.	224
Anglo-Greek Steam Company, <i>In re</i>	244, 248	Brown, <i>Ex parte</i>	114
Archbold v. Sculley	35	— v. Gordon.	185
As h <i>Re</i> , <i>ex parte</i> Fisher	114	Brunmitt, Thorpe v.	23
Atorney-General v. Birming- ham Corporation	10	Buckland, Hughes v.	274
— v. Cleaves	15	Burdick v. Garrick	162, 167 178, 193, 196, 194
— v. Colney	10	Burn v. Boulton	179, 187
Hatch Lunatic Asylum	10	Bussy v. Story	100
— v. Gee	14	Butler, Walker v.	187
— v. Kingston Corporation	14	Cairncross v. Lorimer	15
— v. Leeds Corporation 8, 35	35	Calvert, Wrightson v.	79
— v. Mayor of Dublin 225	225	Capel v. Child	257, 262, 264, 271
Bain v. Whitehaven and Fur- ness Junction Railway Co. . . .	68, 70	Carpenter, Lowe v.	11
Ball v. Ray	11	Carruthers' Assignees v. Nolte- nius	113
Bartholomew, East Gloucester Railway Company v.	68	Chamberlain v. King	275
Baxendale, Rice v.	205	Cheltenham Railway Com- pany, Gordon v.	10
Beale, Scott v.	185	Child, Chapel v.	257, 262, 264, 271
Bell, <i>Re</i>	147, 170	Cleave v. Jones	189
Bentham v. Wiltshire	239	Cleaves, Attorney-General v. . .	15
Berlin Great Market Company <i>In re</i>	243, 247	Clowes, <i>Ex parte</i>	184, 185
Bicket v. Morris	7	Colney Hatch Lunatic Asylum, Attorney-General v.	10
Bird v. Lake	12	Cooke v. Forbes	14
Birmingham, Bristol, and Thames Junction Railway Co. v. Locke	69	Coombe, Edwards v.	222
Birmingham Corporation, At- torney-General v.	10	Cooper v. Hubbuck	23
Blackmore, Dobson & Sutton v. .	18	Crichmore, Theobald v.	274
Boler, <i>Ex parte</i>	162	Crossley v. Lightowler	8
Bolland, <i>Ex parte</i>	167	Crosman, Manning v.	82, 83, 87, 90, 91, 92, 98, 105, 106
Bothomley v. Squire	230	Croucher, Slim v.	225
Boulton, Burn v.	179, 187	Curtis v. Fulbrook	239
		Dakins, <i>Ex parte</i>	60, 64
		Davenport v. Goldberg	16
		Devon, Ward v.	239
		Dickinson, Orr v.	233
		Dobson & Sutton v. Black- more	18

	Page.		Page.
Doe d. Hampton v. Shotter	221	Harris v. Farwell	185
Doody, Kelly v.	88, 90, 92	— v. Rickett	113, 116
Dracachi v. Anglo-Egyptian Navigation Co.	129	Hart v. Alexander	184
Dubbins, Patching v.	10	— Leete v.	274
Dublin (Mayor of), Attorney- General v.	225	Haskew's Case	247
Durrant, Goldsworthy v.	225	Hawking, <i>Ex parte</i>	248
Eaden v. Firth	16, 21, 37	Heane, Tippetts v.	179
East Gloucester Railway Co. v. Bartholomew	68	Hearne, Green v.	275
— v. Price	133	Heaton <i>Ex parte</i> , re Moxon	164
Edwards v. Coombe	222	— 166, 177, 185	
Elmhirst v. Spencer	15	Heggie, Roberts v.	67
Evans, Spackman v.	139	Henning v. Swinnerton	232
Everett v. Robinson	165	Hertz v. Union Bank of London	17
Farrant v.	76	Hicks v. Powell	121
Farwell, Harris v.	185	Hiern v. Mill	11
Figlia Maggiore, The	127, 129	Hill v. Great Northern Rail- way Company	11
Firth, Eaden v.	16, 21, 37	Hoddinott, Samson v.	7
Fisher <i>Ex parte</i> , re Ash	114	Hodgson, Nash v.	179, 187
Fleming, Peninsular Co. v.	142	Hooper's Estate, <i>Re</i>	11
Flower, Rolfe v. 181, 184, 194, 199		Hop and Malt Exchange Com- pany	249
Foolcher, <i>Re</i>	147, 170	Houghton v. Reynolds	229, 240
Forbes, Cook v.	14	Hubbuck, Cooper v.	23
Forbes v. Peacock	78, 239	Hughes v. Buckland	274
Fothergall's Case	142	Hunt, Wicks v.	15
Freedom, The	127, 129	Hutton v. Scarborough Cliff Hotel Co.	142
Fulbrook, Curtis v.	239	Ingo, Gibson v.	225
Fynney, Gaunt v.	21	Irish Peat Company v. Phil- lips	69
Gale v. Abbott	23	Jackson, <i>Ex parte</i>	184
Garrick, Burdick v.	162, 167	Jameson, Smith v.	167
— 178, 183, 186, 194		Janeway v. Snewin	67
Gaunt v. Fynney	21	Jardine, Lyall v.	147, 170, 198
Gee, Attorney-General v.	14	Johnson v. Goslett	71
Gibson v. Ingo	225	Jolliffe, <i>Ex parte</i>	233
Goldberg, Davenport v.	16	— v. The Wallasey Local Board	275
Goldsmid v. Tunbridge Wells Commissioners	9	Jones, Cleave v.	189
Goldsworthy v. Durrant	225	— v. Bowles	224
Gordon, Brown v.	185	— v. Williams	274
— v. Cheltenham Rail- way Company	10	Judge, Selmes v.	275
Gosslett, Johnson v.	71	Kean, Waterhouse v.	275
Great Northern Copper Mining Company of Australia, <i>In</i> <i>re</i>	244	Keating, Marsh v.	167
— Railway Co., Hill v.	11	Kelly v. Doody	88, 90, 92
— Swaine v.	22	Kidgill v. Moore	18
Great Western Railway Com- pany, O'Hanlan v.	205, 214	King, Rochdale Canal Co. v.	21, 35
— Swansea Canal Company v.	228	— Chamberlain v.	275
Greene v. Hearne	275	Kingston Corporation, Attor- ney-General v.	14
Grimsditch, Worthington v.	187	Kitchen, Lord Norbury v.	7
Gullick v. Tremlett	10	Lake, Bird v.	12
Guppy, Stevens v.	17	Lange v. Ruwoldt	88, 89, 92, 93
Hammersmith Rent Charge Case	256, 263, 271	Langley Mill, Steam, and Iron Company, <i>In re</i>	247
Hampton (Doe d.) v. Shotter	221	Lawrence's Case	132
		Leeds Corporation, Attorney- General v.	8, 35
		Leete v. Hart	274

	Page.		Page.
Lickbarrow v. Mason	128	Price, East Gloucester Railway Company v.	133
Lightowler, Crossley v.	8	Ray, Ball v.	11
Locke, Birmingham, Bristol, and Thames Junction Railway v.	69	Regina v. Wright	73
London and County Coal Company, <i>In re</i>	244	Reynolds, Houghton v.	229, 240
Professional Building Society, <i>In re</i>	250	Rice v. Baxendale	206
Suburban Bank, <i>In re</i>	250	Richards, Southampton Dock Co. v.	69
Lorimer, Cairncross v.	15	Rickett, Harris v.	113, 116
Loveland, Warburton v.	121	Roberts v. Heggie	67
Lowe v. Carpenter	11	Roberts v. Orchard	274
Lyall v. Jardine	147, 170, 198	Robertson v. Thompson	16
Macdonald, Bray v.	222, 228	Robinson Everett v.	165
McKechnie v. Vaughan	79	Murgabroyd, v.	12
Manning v. Crossman	82, 83, 97, 90, 91, 92, 98, 105, 106	v. Alcock	122
Marsh v. Keating	167	Rochdale Canal Co. v. King	21, 35
Martin v. Powning	228	Rolfe v. Flower	181, 184, 194, 199
v. Upshot	274	Ruwoldt, Lange v.	88, 89, 92, 93
Mason, Lickbarrow v.	128	Sampson v. Huddinnott	7
Metropolitan Saloon Omnibus Company, <i>Ex parte</i> Hawking	248, 253	Sanderson's Patent Association, <i>In re</i>	244
Mill, Hiern v.	11	Saunders v. Smith	24
Moor, Kidgill v.	18	Savage, Simpson v.	19
Mordaunt v. Mordaunt	231	Scarborough Cliff Hotel Co., Hutton v.	142
Morris, Bickett v.	7	Scott v. Beale	185
Moxon <i>Re, Ex parte</i> Heaton	164, 166, 177, 185	Sculley, Archbold v.	35
Mumford v. Oxford, Worcester, and Wolverhampton Railway Company	18	Selge, Walker v.	7
Murgatroyd v. Robinson	12	Sellar, <i>Ex parte</i>	59
Nash v. Hodgson	179, 187	Selmes v. Judge	275
Nepoter, The	127, 129	Shaw, <i>Ex parte</i>	165
Nettleship, British Columbia Sawmill Company v.	214	Ship's case	136
Noltenius, Carruthers's Assignees v.	113	Shotter, Doe d., Hampton v.	221
Norbury, Lord, v. Kitchen	7	Simpson v. Savage	18
Nottingham Board of Guardians, The, Walker v.	275	Slim v. Croucher	225
O'Hanlan v. Great Western Company	205, 214	Smith, Saunders v.	24
Orchard, Roberts v.	274	v. Brooksbank	224
Orr v. Dickinson	233	v. Jameson	167
Owen, Parry v.	222	Snewin, Janeway v.	67
Oxford, Worcester, and Wolverhampton Railway Company, Mumford v.	18	Southampton Dock Co. v. Richards	69
Page v. Adam	239	Spackman v. Evans	139
Parry v. Owen	222	Spencer, Elmshirst v.	15
Patching v. Dubbins	10	Squire, Bothomley v.	230
Peacock, Forbes v.	78, 239	St. Cloud, The	127, 129
Peninsular Company v. Fleming	142	St. Helen's Smelting Company, Tipping v.	8
Phillips, Irish Peat Company v.	69	Stevens v. Guppy	17
Powell, Hicks v.	121	Stewart's case	136
Powning, Martin v.	228	Suburban Hotel Co., <i>In re</i>	243, 246
		Sutcliffe, Wood v.	12, 14, 35
		Sutton, Dobson and, v. Blackmore	18
		Swaine v. Great Northern Railway Company	22
		Swansea Canal Company v. Great Western Company	228
		Swinerton, Henning v.	232
		Taite's case	132
		Theobald v. Crichmore	274

X.

CASES CITED.

	Page.		Page.
Thompson, Robertson v.	16	Warburton v. Loveland	121
Thorpe v. Brumfitt	23	Ward, <i>Ex parte</i>	167
Tippetts v. Heane	179	— v. Devon	239
Tipping v. St. Helen's Smelt- ing Company	19	Warren, Tyrie v.	116
Topping, <i>Ex parte</i>	165	Waterfall, <i>Ex parte</i>	143, 171
Tremlett, Gullick v.	10	Waterhouse v. Kean	275
Tunbridge Wells Commis- sioners, Goldsmid v.	9	Watson, <i>Ex parte</i>	167, 185
Turner <i>Re, Ex parte</i> Woodward	164	Wellesley v. Wellesley	229
Tyrie v. Warren	116	West Surrey Tanning Com- pany, <i>In re</i>	243, 248
Union Bank of London, Hertz v. 17		Whitcomb v. Whiting	179, 187
Upshot, Martin v.	274	Whitehaven and Furness Junc- tion Railway Co., Bain v.	68, 70
Vaughan, McKechnie v.	79	Whiting, Whitcomb v.	179, 187
Walker v. Butler	187	Wicks v. Hunt	15
— v. The Nottingham Board of Guardians	275	Williams, <i>Ex parte</i>	184
— Bright v.	11	— Jones v.	274
Wallasey Local Board, The.		Wiltshire, Bentham v.	239
Jolliffe v.	275	Wood v. Sutcliffe	12, 14, 35
Walsh, <i>In re</i>	221	Woodward, <i>Ex parte, Re</i> Turner	164
Walker v. Selfe	7	Worthington v. Grimsditch	187
		Wright, Regina v.	73
		Wrightson v. Calvert	79
		Vernon v. Vernon	231

THE
SOUTH AUSTRALIAN LAW REPORTS.
1874.

SUPREME COURT.

GWYNNE, PRIMARY JUDGE.]

[EQUITY.

28, 29, 31 OCTOBER, 4, 5, 7, 13, 14, 20, 21 NOVEMBER, 1873,
10 MARCH, 1874.

WHITE V. TAYLOR.

*POLLUTION OF STREAM. — Prescriptive right — Laches —
Acquiescence — Interlocutory Injunctions — Injunctions on hearing.*

A Bill of Complaint filed by a riparian owner, set out, amongst other things, that at a period more than twenty years before the institution of this suit the defendant had commenced certain wool-washing operations, the effects of which were to pollute the stream of the river, but owing to the small extent of such operations the pollution had not become sensible until some six years previous to the filing of the Bill, when the plaintiff and other riparian owners had addressed a circular to the defendant requesting that steps might be taken to remedy the evils complained of, and to compensate such riparian owners for the damage sustained.

To this circular there was no reply, but for some time afterwards the nuisance considerably abated, so that the plaintiff refrained from legal proceedings until compelled to do so by a recent renewal of the pollution.

The defendant, by his answer, admitted, amongst other things, the carrying on the said trade, and averred that he had done so for a

SUPREME COURT.

WHITE V. TAYLOR.

EQUITY.

period of twenty-four years and upwards, but denied that the river had been in any way polluted by reason thereof, and also denied that there had been any diminution in the work carried on after the receipt of the circular before referred to.

The defendant also claimed a prescriptive right to the use of the water for the purposes of his said trade, and set up that the plaintiff had deprived himself of all right to relief by his laches.

His Honor being of opinion that the evidence established the fact that the river was wholly or in part polluted to the extent complained of by the operations of the defendant,

Held—1. That the averment of the defendant, in his answer, that the river never had been polluted by him, was inconsistent with and negatived any claim by prescription to use the same in such manner as to pollute the stream.

2. That in order to show that the plaintiff had, by his laches, deprived himself of his claim to relief, it would be necessary to prove, not merely that he had failed to prosecute with diligence, but that he had stood by and allowed the defendant to incur expense without taking steps to prevent his so doing, and that where there is a Statute limiting the time within which proceedings might be instituted there might be acquiescence, but there would not be laches to deprive a party of his remedy if proceedings were taken within the statutory limit.

Principles regulating and granting of interlocutory and injunctions on hearing distinguished.

- 3. It is optional with, and not obligatory on, the Primary Judge to postpone the granting of an injunction until questions of fact or title have been decided at law, and the Primary Judge will not so postpone except in cases of doubt.*
- 4. It is no answer to a Bill, praying for an injunction to restrain a nuisance, that there are contributors to such nuisance not parties to the suit, unless such contributors are acting in concert with the defendant.*
- 5. The pollution of a stream is an injury to the inheritance in respect of which one entitled in reversion to the land through which the stream flows is entitled to institute a suit in Equity, or to recover damages by action.*

THIS was a bill filed by Charles White, of the Reedbeds, grazier, setting out that he was seised in tail male of about 335 acres of land at the Reedbeds, forming a beautiful and valuable property, and that a great part of its beauty and value consisted in the River Torrens, which ran through part of the estate in a defined stream, and then spread itself over the westernmost portion of the

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

property in a marsh or swamp. The river flowed in a clear stream, with a sandy bottom, and contained a large number of native fish, and the water was of very good quality, and well fitted for culinary and domestic purposes. About the year 1865 the river became polluted. The amount of water in the stream was subject to considerable fluctuation; in the winter time, between the months of June and September, it being full and tolerably rapid, but in the summer, and generally during the rest of the year, the water was of small quantity and ran slowly, and in the year 1870, which was a very dry season, the stream entirely ceased to run. In summer the river was subject to considerable and rapid increase after heavy rains, which flush the stream, causing it to rise from ten to twelve inches above its natural summer level. At about three miles and a-half above the estate were some fellmongery and wool-washing works on the south bank of the river, which works were in the possession of and conducted by the defendant. Ever since the death of his father the plaintiff and his mother have resided in the house on his said estate, and the plaintiff has carried on the business of a grazier and agister of cattle, and one of the principal inducements to dealers to place their horses and cattle with him, especially in the summer time, was the abundance of grass and water on the property. The defendant commenced his business of a fellmonger and woolwasher in the year 1847, and had from that time continued to wash wool and sheepskins, and the wool obtained from a certain process known as sweating sheepskins in the said stream, and had turned or allowed to flow or run into the stream, the soap, soda, and other materials used in such washing, and the dirt, filth, grease, and animal matter and refuse washed out of such wool. When, however, the defendant commenced his business his operations were small, and the materials used in the said business and the matter so washed out was for several years very inconsiderable, and did not affect the property of the plaintiff to any sensible extent; but the business of the defendant had gradually grown larger, and particularly about six years ago the quantity of wool washed so much increased that its pernicious effects were clearly perceptible, and since that time the amount of washing and refuse had gone on increasing, and as a consequence

now and for some time past the River Torrens, below the defendant's works, was foul, noxious, and offensive, often of a dark colour, and sometimes very thick and black, with a greasy scum on the surface, and depositing a black mud in its bed and a greasy scum on the banks. The result was that the fish were killed, the horses and cattle refused to drink unless compelled by excessive thirst, the water was rendered useless for washing or domestic purposes, and the stench from it was often so very great and offensive that it could be smelt at a great distance, often as far as 700 yards from the river. When the current was rapid the evils complained of were only apparent while the wool-washing operations were going on, and at night, or on Sundays, when the works stopped, the water became clear. The defendant also had erected a dam across the stream opposite to the west end of his works, and a short distance above a bridge known as Taylor's Bridge. The water where impounded by this dam was several feet deep, and the defendant, after washing his wool, when one of the flushes came down the river, raised the dam, and for many hours afterwards the water was rendered totally unfit for use. By reason of the pollution of the water, as set out, the plaintiff has been put to the expense of digging wells and erecting tanks to supply the necessary water for domestic purposes and the necessities of his business, and his said business as a grazier had also considerably suffered. On the 16th July, 1869, the plaintiff and other riparian owners addressed a circular to the defendant and others carrying on similar trades in his neighbourhood, requesting that steps should be taken to remedy the evils before mentioned, and also compensation awarded. To this circular no reply was made. Legal proceedings were next threatened, and subsequently, in November, 1869, a public meeting was held at Hindmarsh for the purpose of considering what steps should be taken for the protection of the trades then being carried on upon the River Torrens; and at such meeting it was resolved to present a petition of the residents in the District of West Torrens to the House of Assembly, praying that measures should be taken to legalize the carrying on such trades throughout the colony as tanning, currying, wool-washing, soap-boiling, brewing, and boiling-down. Shortly after such meeting the nuisances com-

plained of considerably abated, and the plaintiff consequently did not then take the proceedings threatened. Recently, however, all the objectionable operations above detailed had been resumed, and consequently all the evil consequences were now as badly felt as before.

Prayer.—1. That the defendant, his workmen, agents, and servants might be restrained by the injunction of the Court from placing, or throwing, or turning, or causing, or allowing to run or mix with the said stream or River Torrens, any noxious or deleterious fluids, or substances whereby, or in consequence whereof, the water in the said stream or river, where it runs through or near the plaintiff's premises, was or might be fouled or polluted, or rendered noxious or offensive; or whereby, or in consequence whereof, the plaintiff was or might be injured or affected in the comfortable or beneficial enjoyment of the house and premises devised by the said will.

2 That the defendant might pay the costs of the suit.

3. For general relief.

The defendant, John Taylor, of Thebarton, fellmonger, by his answer admitted that he conducted the business, the cause of the alleged nuisance, and had done so for a period of twenty-four years, but alleged that the quantity of impurity flowing into the river was very small, as the wool-washing had been conducted in the following manner:—The wool was first placed in a boiler of hot water, and when sufficiently clean it was taken out and strained, and the water ran back into the boiler. The wool was then taken into the river and washed. All the grease came out in scouring, and remained in the boiler. The boilers used were emptied about once a month, but before that was done they were allowed to remain until all the grease, dirt, filth, and animal refuse had settled, and the water was clear; it was then allowed to drain into the river, and the sediment which remained in the boilers was used for manure. The boilers were kept filled with clear water, and were not emptied at all during the process of scouring. A small

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

portion only of the wool required that process, and last year the quantity was particularly small, owing to the wool being generally in a clean condition ; the quantity of soap and soda used, also, was very small, as the latter was apt to injure the wool ; two gallons of soap and soda would last for two days. Last year no soda had been used, and a much less quantity of soap, in some cases none at all. When the wool was washed in the river the grease did not come out, only the sand and dirt, it being an advantage to keep the former in the wool. It was denied that the water impounded by the dam was rendered more impure thereby, or that floodgates were opened for the purpose of cleansing it when a flush came down ; the object of such opening was alleged to be to prevent the dam being washed away. The defendant also denied that the fish had died in consequence of the pollution of the water, the only occasion when that had occurred being last summer, when the intense heat and the small quantity of water killed them ; the horses, also, had never refused to drink the water. There was no decrease in the operations at the works after the public meeting above referred to, and the wool-washing was now being carried on, and the defendant avowed his intention of continuing to do so. The water below the works was as good as that above, and the horses and cattle would use it at all times, such water being also quite fit for culinary and domestic purposes ; and it was further denied that the condition of the water was different at night or on Sundays from any other times. It was denied *in toto* that the river had been in any way polluted by the operations at the works of the defendant, or that the plaintiff was annoyed, or his property injured in any way thereby ; and the defendant submitted that as he, and those under whom he claimed, had uninterruptedly used the water of the river in the manner in which it was now used by him for twenty years and upwards, he ought not to be disturbed in such use of it.

A mass of evidence was taken and read at the hearing, the purport of which sufficiently appears, as far as the same is material to the issues involved, from the comments of counsel, and the review of His Honor the Primary Judge in delivering judgment,

Way, Q.C., for the plaintiff.—The questions at issue may be briefly stated to be three, viz. :—First. Has the plaintiff been injured to such an extent as to entitle him to come to the Court for an injunction? Secondly. Does such injury, if existing, proceed wholly or in any material degree from the works of the defendant? And thirdly. Has the plaintiff lost his rights by virtue of the law of prescription, or from his own *laches*? Taking first the last of the points indicated, the questions arising in it have not been properly pleaded. (GWYNNE, J.—Prescription technically considered is not in force in this colony, as it refers to a period “to which the memory of man runneth not to the contrary,” which if I remember right has been legally fixed to as far back as the reign of Richard II.) Prescription only exists here in so far as it applies to limitations fixed by Statute. If it can be satisfactorily established that the cause of all the baneful consequences indicated by the bill proceeds from the operations on the premises of the defendant it will undoubtedly be sufficient to entitle the plaintiff to the relief sought, as will be seen from the cases as to the nature of injuries which will justify the granting of an injunction—

Walter v. Selve, 4 Eng. Law & Eq., 15

Bickett v. Morris, L.R., 1 H. of L., Scotch App., 47

Lord Norbury v. Kitchin, 9 Jur. (N.S.), 132; 7 L.T.N.S. 685; 3 F. & F. 292

Sampson v. Hoddinott, 1 C.B. (N.S.), 590.

(GWYNNE, P.J.—I believe I am right in saying that with reference to water the cases show a classification into ordinary and extraordinary use—the former applying to domestic and culinary purposes, and the latter to grazing, for instance.) The plaintiff's title consists partly of a reversion, partly of a tenancy for life, and partly of a seisin in fee. But, despite the diverse character of such title, the plaintiff is entitled to claim relief from injury to his comfortable occupation of the entire property. With regard to the reversionary interest, also, unless steps were at once taken to stop the alleged nuisance, it might run on until prescription could be set up as a bar to any attempt at alleviating it—

Kerr on Injunction.

The next point is whether the defendant is accountable for the injury of which the plaintiff complains, or has in any material degree contributed to it. The plaintiff's evidence shows that following the river from his property up towards Adelaide he discovered the dam which the defendant erected, and from which impure water was flowing, and he also saw that the general mode of conducting the defendant's business was such as to amply satisfy him (the plaintiff) that the defendant's operations were the cause of the injury from which he was suffering. That conclusion also was confirmed by an inspection of the river above Hindmarsh at the Railway Bridge, where the water was found sufficiently pure for human consumption. The testimony of the plaintiff detailing those facts as to the condition of the river has been substantiated by witness after witness. Prior to the end of 1868 or early in 1869 no dam had been built at the defendant's works, as, according to Mr. Taylor's own admission, his business was comparatively small up to that time, and it was its large increase about that date, attributable in no inconsiderable degree to the equally increasing operations of Mr. Bagot's boiling-down works, from which a large number of skins were procured, which led to the dam being constructed. There was also evidence that the water, even though considerably affected by the refuse from the works of Messrs. Peacock and others, received additional pollution after passing defendant's premises. The question whether the pollution arose from other sources has not been raised by the pleadings, and even if it had there would be no defence on that ground—

Crossley v. Lightowler, L.R., 2 Ch., 478

Attorney-General v. Leeds Corporation, L.R., 5 Ch. App., 583

Tipping v. St. Helen's Smelting Company, L.R., 1 Ch., 66 ;
11 H. of Cases, 642.

It is impossible for the plaintiff to attack at one time all concerned in depriving him of his riparian rights, supposing there are others besides the plaintiff. The last point is whether the plaintiff has

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

lost his rights by his own *laches* or by virtue of a prescriptive title vesting in the defendant. The plea of prescription requires to be specifically and formally pleaded, and the bare allegation in defendant's answer is not a sufficient compliance with that requisition. The prescriptive right by virtue of occupation for twenty years arises under the Statutes 2 and 3 Wm. IV., c. 71, and by section 5 of that Act provision is made for the proper method of placing the plea on the record. (GWYNNE, P.J.—I imagine also that the prescription must arise out of an equable and continuous use; not that, for example, the defendant could allow one gallon of impure water to enter the river one year, and five years afterwards increase the amount to five gallons. In such a case an entirely fresh prescriptive title would date from the time of the larger pollution.) The cases go even further, and establish that when the injury gradually increases no right of prescription arises at all. Turning to the pleadings, too, the defendant does not say that he claims by virtue of a right extending to a period twenty years before the institution of the suit, as it was incumbent upon him to do in order to entitle him to the benefit of the plea. And again, it was necessary for him to have shown that there has been a continuous use of the easement, the measure of the user being its enjoyment. It is not sufficient for the defendant to say that twenty years ago he did certain things, but there must be clear evidence that such user has not fallen into disuse, but has been regularly and evenly exercised. In the suit before the Court, however, it has been proved and admitted that between the years 1861 and 1867 the defendant's business fell off very materially, and that there was a corresponding reaction after the erection of the dam. The origin of a prescriptive right is a presumed grant, but if the exercise of that right is continually changing its character there will only be an implied grant from day to day—

Goldsmit v. Tunbridge Wells Commissioners, L.R., 1 Eq.,
161, 35 L.J., Ch. 382.

The prescription, too, only arises from the time when the presumed grantor is prejudicially affected by the exercise of it—

Murgatroyd v. Robinson, 26 L.J., Q.B., 233, 7 Ell. & Bl., 391.

And there is no attempt on the part of the defendant to contradict the plaintiff's statement that up to the year 1865 he had no cause of complaint; in fact, the defendant's case is that the stream is good to the present day. The question whether the plaintiff acquiesced in the operations which caused the alleged pollution is not taken in the pleadings. The foundation of the doctrine of acquiescence is that one party stands by and allows the other to incur great expense, under the impression that no objection will be raised to what is being done. The facts before the Court, however, disclose a totally different state of affairs, for in 1869 the plaintiff went round to his co-riparian proprietors and procured signatures to a circular requesting the defendant to abate the nuisance, and protesting against the injury inflicted. All his subsequent acts, too, show that his position could not possibly have been construed into any encouragement of the defendant's proceedings; but the doctrine of acquiescence can only be applied where there has been a leave, amounting to an actual grant, of right—

Patching v. Dubbins, Kay's R., 11

Gordon v. Cheltenham Railway Company, 5 Beav., 229

Attorney-General v. Colney Hatch Lunatic Asylum, L.R., 4 Ch., 146

Attorney-General v. Birmingham Corporation, 4 K. & J., 528

Kerr on Injunctions

Gullick v. Tremlett, 20 W.R., 358.

Ingleby and *Stuckey* followed on the same side.—It is clearly substantial damage to render a running stream useless for culinary or domestic purposes, or for watering cattle, or to in any way pollute it by the discharge of sewage into it—

Kerr on Injunctions.

The plaintiff also desires, besides the specific relief prayed for,

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

damages for the injury he has sustained, and also the removal of the dam, which was the primary cause of the nuisance, and to that he is entitled under the prayer for general relief—

Equity Act, 1866, sec. 141

Hiern v. Mill, 13 Vesey Jun., 119

Lewis's Eq. Draftsman.

(GWYNNE, P.J.—I imagine that if damages were awarded at all, they can only extend to the time of the filing of the bill.) The plaintiff is entitled to relief right up to the hearing—in short, for all past damage—and an injunction restraining from future injury—

Ball v. Ray, L. R., 8 Ch. App., 467.

(GWYNNE, P.J.—The question is what is the definition of past.) As to the question of prescription, there must be a continuous user to entitle a defendant to set up that, and the right is only co-extensive with such user—

Hill v. Great Northern Railway Co., 5 DeG., McN., & G., 66

Ball v. Ray, L.R., 8 Ch. App., 467.

The knowledge and assent of the party against whom the right is claimed must also be clearly established—

Bright v. Walker, 1 C.M. & R., 211

Lowe v. Carpenter, 6 Ex., 825.

The question whether there was any necessity for the matter to be referred to a Court of Law has not been properly raised, but even if it had been the cases decide that there is no such necessity—

Equity Act, sec. 7, *re Hooper's Estate*, 2 DeG., J. & S., 354.

Another question, not raised by the pleadings, but suggested by the evidence, is whether the defendant, by parting with the works

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

has deprived the plaintiff of any right against him. That, however, can only be the case when there has been a *bona fide* sale prior to the institution of the suit—

Bird v. Lake, 1 H. & M., 111.

The Attorney-General (*Mann*) for the defendant.—There can be no doubt that the stream of the River Torrens has been to a great extent prejudicially affected from some cause or causes, but the important question for decision is whether the evidence which has been adduced in the suit before the Court clearly traces to the defendant any serious contribution to such pollution. Then, again, is the plaintiff debarred by prescription of his own *laches* from the relief sought? The former position the defendant purposes to abandon, as the case of

Murgatroyd v. Robinson, 26 L.J., Q.B., 233,

which has been relied on by the other side, clearly establishes that prescription only arises from the time when the presumed grantor was prejudicially affected by the exercise of it, and was cognizant of such prejudicial influence, and the defendant would, at any rate, have great difficulty in supporting such a position. As to the *laches*, however, the defendant asks the Court to decide that the plaintiff has been remiss and failed in exercising due diligence and necessary precaution in the protection of his own rights, supposing them to have been infringed. With regard to contributory pollution, it has been contended for the plaintiff that such a defence cannot be set up; but if it can be shown that serious impurity was imparted to the stream by others, and that the defendant's works were but accessory sources of pollution, he will be entitled to ask that no injunction be given against him—

Wood v. Sutcliffe, 21 L.J. (N.S.), Ch., 253.

As to that the evidence is overwhelming that the removal of Taylor's works would not put the plaintiff in a better position. On

the question of the state of the river at different localities—Peacock's dam for instance—as contrasted with the water near the works of the defendant, there is only the testimony of the plaintiff himself, and Mr. Spinks, who has been engaged in collecting evidence for him. When the thirty odd other witnesses for the plaintiff were cross-examined on the subject they simply asserted that the deleterious matter which rendered the stream unfit for use came from the defendant's yards, but their evidence was merely based upon hearsay or the wildest conjecture. There was, however, one circumstance in the case on which the plaintiff's witnesses were wonderfully unanimous, and that was as to the time when the pollution first became clearly perceptible. They all agreed that in the year 1865 the beautiful, clear, sandy-bottomed stream was turned into a volume of impurity. It is an extraordinary fact, however, that although wool-washing operations had been carried on for over twenty years, the dreadful state of things disclosed by the evidence was only discovered about six years before the filing of the plaintiff's bill. The black flushes of water many of the witnesses stated came down the river when let off from the defendant's dam, but there was an irreconcilable inconsistency between the times fixed by the various deponents, some saying it occurred on Saturday, and others on Sunday, and others again on Monday. Against this there were the positive oaths of the defendant and one of his witnesses, that the water was only let off when the natural floods came down the river. It was said, also, that the dam was raised once a week, but if it be remembered that it would take four or five days to collect the body of water again, it will be seen that such a proceeding would have interfered seriously with the defendant's operations. The only solution which could be suggested as to the flushes was that they might have come from Peacock's dam, which it was proved was higher than the defendant's. The true point of the case is, however, that the *onus* was cast on the plaintiff of proving that the water went into defendant's dam in a most appreciably purer condition than when it left it; but instead of establishing that, the positive evidence of the plaintiff's own witnesses was that no perceptible difference existed between the stream at Peacock's works and at the defendant's. In

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

conjunction with that must be taken the chemical evidence of Mr. Francis, who says that the pollution from all the fellmongery operations on the river was but as a fleabite to the impurity communicated from the other sources he mentioned, and that the slaughter-house alone was worse than all the Hindmarsh works together. Mr. Biggs, too, who had supplied the people of Bowden and its neighbourhood with water for a length of time, stated that his customers had sometime since objected to the water taken from about the Railway Bridge, which he served them with; and, also, that when he was supplying the South Australian Gas Company with sand the engineer declined to receive the discoloured and impure sand, which had also been procured from above Hindmarsh. The evidence, both scientific and expert, further agreed that nothing but dirt was washed into the stream from the wool, and not any greasy matter. (GWYNNE, P.J.—It is to be regretted Mr. Francis did not make analyses of the water both at Peacock's and the defendant's dams, and also below them.) Undoubtedly, it would have been more satisfactory if that had been done; but the gentleman mentioned has only been called on behalf of the defendant, as it was understood he had for his own private purposes inspected the river in the locality of Hindmarsh. The contention for the defendant is, that where the damage occasioned by a nuisance is comparatively small no injunction will go against him—

Attorney-General v. Kingston Corporation, 34 L.J. (N.S.), Ch., 481

Attorney-General v. Gee, L.R., 10 Eq., 131

Cook v. Forbes, L.R., 5 Eq., 166

There has been no evidence produced tracing any pollution of the water directly to the defendant, and certainly not to any serious extent. We also contend that the plaintiff is barred by his own *laches*. The bill evidently contemplated that such an objection was sure to be raised, as will be seen by the references to the circulars and letters addressed to the defendant and others, and the alleged influence on the plaintiff of the meeting at Hindmarsh, as to which latter it must always be borne in mind that the defendant had nothing whatever to do. In

Wood v. Sutcliffe, 21 L.J. (N.S.), Ch. 253,

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

an acquiescence for five years was held to be sufficient to entitle the defendant successfully to set up *laches* on the part of the plaintiff; but it was shown in the case now before the Court that, at any rate since 1865, Mr. White was fully aware of the stream being affected, and that the defendant was, in some degree, at least, the cause of it. But the case quoted was much stronger, inasmuch as there an action at law had actually been commenced, but the plaintiff neglected to enter up judgment and take proceedings in Equity, though a notice of an intention to take such latter steps was given. It is surely a much stronger case of acquiescence on the part of Mr. White when it is seen that he has allowed expensive buildings and the dam to be erected, and the defendant's business to be otherwise increased. An attempt to excuse that has been set up, viz., that the plaintiff was engaged in getting up evidence during a lengthened period; but that is no justification, as, if it were, a period of twenty years might be allowed to lapse on the same grounds—

Cairncross v. Lorimer, 7 Jur., N.S., 149

Wicks v. Hunt, Johnson's Reports, 372.

In the case last cited the plaintiff had waited for only two years and a-half, and, further, had told the defendant that if he proceeded with the erection of certain works a bill would be filed; but it was held that the plaintiff was not entitled to relief, as he had allowed the buildings to proceed, and not taken action until after their completion. Then the plaintiff should have first established his position at law before coming to a Court of Equity. Before the Chancery Amendment Act, 20 and 21 Vict., c. 27, which was anterior to the local Equity Act, that was the practice, and the Courts will not grant injunctions unless the nuisances complained of have first been decided at law to be so—

Elmhirst v. Spencer, 2 McN. & G., 45

Attorney-General v. Cleaver, 18 Vesey Jun., 210.

By Sir John Rolt's Act, 25 and 26 Vict., 42, the power of deciding all the issues involved in suits of injunction has been, however,

expressly conferred on the Equity Courts; but that Statute was passed since the foundation of the Province of South Australia, and, therefore, is not in force here. But it is said that the Primary Judge is invested by section 7 of the Equity Act, 1866-7, with all the statutory powers of the Lord Chancellor. His Honor, however, has recently held, in the case of *in re Johns*, that such was not the intention of the section referred to. (GWYNNE, P.J.—That is my opinion.) Then that being so, and Sir John Rolt's Act not being in force in the colony, we must go back to the practice before the Chancery Amendment Act, though the case of *Wicks v. Hunt* decided that even that Act did not extend the jurisdiction in Equity as to trial of cases of nuisance without an issue at law. As then there is a *bona fide* dispute as to the facts, the defendant is entitled to ask for an issue before a Jury. Of course there is a discretionary power in the Court on the subject, but it will only be exercised under the guidance of the authorities on the point, and it is contended that the Primary Judge, under the practice as existing before the Chancery Amendment Act, is bound to direct the trial of an issue at law—

Davenport v. Goldberg, 2 H. & M., 282

Eaden v. Firth, 1 H. & M., 573.

The case of *Robertson v. Thompson*, 7 DeG., McN., & G., 242, which has been relied on by the plaintiff's counsel as conclusive against adopting the course specified, was tried subsequent to Sir John Rolt's Act, and was expressly governed by it. On the question of damages, it surely cannot be seriously contended that an equitable assessment can be made when the number of contributory sources of pollution to the Torrens are considered. The plaintiff will be bound to show what damages he has sustained in consequence of the defendant's operations, separate and apart from any injury inflicted by others, and even then he will, as suggested by the Court, only be entitled to compensation up to the date of the filing of his bill. But the question of damages, also, is one essentially belonging to a jury, and should be referred to them for consideration.

Cur. ad. vult.

13 November—

Stow, Q.C., followed on the same side.—The main questions for consideration may be stated briefly to be—What does the plaintiff ask for? how does he claim to be entitled to relief? and what facts have been relied on to prove the case? The point as to prescription I do not intend to press, but I certainly shall urge the fact of the length of time allowed by the plaintiff to elapse before taking any action antagonistic to Mr. Taylor, which delay must necessarily raise the presumption that the defendant was not in any serious degree the cause of the alleged pollution. By his bill the plaintiff states that the wool-washing operations, of which he now complains, have been working for over twenty years, and the evidence conclusively shows that, at any rate for a part of that time, the extent of the operations has been quite as great as in later years. It is not attempted to be said that during the whole of the period specified there has been a perceptible contamination of the river, and no satisfactory reason has been shown why any greater cause of complaint exists now than formerly. It must be borne in mind, also, that the plaintiff is restricted to relief upon facts supporting the allegations of his bill, and that he cannot ask for something entirely foreign to the pleadings. The only case in which relief will be granted which has not been specifically prayed for is when there are allegations made in the bill with the view of obtaining such relief, because if that were not so the defendant would not have his attention called to the case on which the plaintiff came into Court, and, consequently, would be taken by surprise—

Daniel's Ch. Pr.

Stevens v. Guppy, 3 Russell, 171

Hertz v. Union Bank of London, 1 Jur., N.S., 127.

The prayer of the bill, also, is in respect of two separate estates in the plaintiff, the one freehold, and the other reversionary; and as to the latter title he cannot obtain relief, as it is only where something is being done which inflicts an injury on the inheritance that a reversioner can ask the Court for protection. Such injury, too, must be of a permanent character, and not of a nature which

B

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

will admit of its being removed at any moment, and it further requires to be proved to be in active operation. There is no right to presume a continuance of any nuisance, and the matter in respect of which an injunction is asked for must, in suits by reversioners, be *per se* both permanent and prejudicial—

Kidgill v. Moor, 9 C.B., 364

Dobson and Sutton v. Blackmore, 9 Q.B., 991

Simpson v. Savage, 1 C.B., N.S., 347

Mumford v. Oxford, Worcester, and Wolverhampton Railway Co., 1 H. & N., 34.

Looking at the nature of the plaintiff's case, and the proof of the injury in respect of which he claims relief, it is to be remarked, in reference to the flushes of water which have been said to come from the opening of the sluiceways of defendant's dam, that nothing of that kind has been proved by the evidence; and, moreover, there has been a total failure to show what it was essential to have been satisfactorily established, viz., that pure water flowed into the defendant's premises, and was there impounded by him, rendered impure, and then flooded down to the plaintiff's property. There is no charge made in the bill for impounding water already impure, and therefore, if the evidence points to such a state of things as existing, the plaintiff will have no right as against Mr. Taylor in respect thereof. The plaintiff's case is that for many years the operations, which are now so objectionable, have been continuously carried on, but that it was only in the year 1865 that they became a source of injury and annoyance. The vague language of the bill, however, clearly shows there was no definite information as to the extent of the pollution by the defendant, and it was not sufficient to say there was a great sewage from the city, and a number of fellmongery works at Hindmarsh, and the defendant is the owner of one of the latter. The *onus* undoubtedly lies upon anyone charging a nuisance under such circumstances to show that the person against whom he has instituted proceedings did, in a serious and clearly perceptible degree, aid in causing such nuisance, and that if all the other sources of injury were removed

such single individual would, by his operations alone, materially prejudice the plaintiff. In the case now under consideration it is evident, bearing in mind that the defendant's works have been in existence for a lengthened period, and that only recently has the impurity of the river become serious, that some new source of contamination must have arisen, and that is palpably to be found in the largely-increased sewage from the rapidly-growing city of Adelaide, and also in the fact of the number of fellmongery works on the river having now reached something considerable. The plaintiff himself in his bill refers to the defendant "and others," and when he first contemplated applying for an injunction it was shown that he instructed his solicitor to write to Messrs. Peacock & Son, as those who were most largely responsible for the injury from which he was suffering. Under such circumstances it surely was incumbent on the plaintiff to have put in evidence an estimate of the respective proportions in which the defendant and Messrs. Peacock polluted the stream. There has, however, been no attempt to do that; and, further, the large sewage from the city has been entirely ignored. (GWYNNE, P.J.—The bill does not attack defendant as a contributor, but as the head and front of the whole offending.) Yes. The plaintiff's counsel has very ingeniously endeavoured to show that the defendant admits the main charges of the bill, but pleads in extenuation that other persons largely assisted in causing the pollution complained of. That is not, however, the position assumed by the defendant, whose primary defence is that the plaintiff failed to prove him to be accountable for any of the contamination of the river with which it is sought to charge him. It is, in short, an attempt to make the defendant a scape-goat. In considering the question of pollution, too, it is worthy of notice that with regard to the city sewage it would be held in suspension by the water for some distance after entering the river, but by the time it reached the plaintiff's locality would precipitate itself, and, putrefaction setting in, would produce all the baneful effects which had been deposed to. There has been an endeavour on the part of the plaintiff to show that the increased pollution was due to the extended nature of the defendant's operations, but the only evidence to support that position was given by persons

who admittedly had only made a cursory examination of Mr. Taylor's premises, while the explanation of the defendant that a larger number of hands were engaged by him in consequence of his opening up other branches of business besides wool-washing, was quite reasonable, and as it remains uncontradicted such testimony is entitled to the credence of the Court. (GWYNNE, P.J.—The question is whether, if it were proved that ten parties contributed to rendering the stream unfit for domestic or other purposes, and they all did so without any licence on the part of the plaintiff, would not an injunction go against the first polluter, and successively up to the tenth. I quite see, however, that even supposing the defendant were restrained from pursuing his operations there is sufficient impurity poured into the stream from other sources to render it useless.) As to the first question raised by the Court, the plaintiff has failed to prove that the defendant in any way seriously contributed to the pollution of the river; and as to the opinion expressed that there is sufficient sewage to vitiate the water, apart from that alleged to follow from defendant's premises, it is to be observed that the only attempt on the part of the plaintiff to establish the fact that the water above Taylor's dam was good, was the production of a single bottle of water taken from above Hicdmarsch. Coming to the scientific evidence for the plaintiff, it cannot, in the particular questions under consideration, be considered of much value, as the chemist who has been called admitted he did not know what the yolk in wool was, and that he had no knowledge of the sewage of the city. (GWYNNE, P.J.—I am not much impressed by the chemical testimony. I think the Government should appoint a thoroughly competent analytical chemist, so that on questions of scientific investigations able and impartial evidence might be procurable.) The evidence of Mr. Francis on the part of the defendant is of a far more satisfactory nature, and from his statement as to the immense sewage going into the river from the city drainage, it is quite clear that the Corporation of Adelaide should have been first attacked, and not the defendant. On the question of acquiescence it need only be pointed out that the plaintiff admits the pollution to have been serious as early as the year 1865, and it was not until 1869 that

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

any steps whatever were taken with the view of preventing the nuisance, while two more years elapsed before the institution of the suit before the Court. It is not necessary, as has been contended by the plaintiff, to plead such a defence—

Law's Eq. Pleading, 189,

and it has been held that but a very short delay is necessary to render the defence a good one—

Rochdale Canal Company v. King, 15 Jur., 962.

Such delay also is a strong reason why the plaintiff should be left to his remedy, if any, at law. At any rate the defendant is entitled to have an issue directed to be tried by a jury, as there can be no doubt that a very great conflict exists in the facts, and even since Sir John Rolt's Act it has been held that a defendant is entitled to make such a requisition. That is shown by the case of

Eaden v. Firth, 1 H. & M., 573,

which has been previously quoted on the argument. Lastly, on the question of damages, even putting the case most strongly for the plaintiff, it is shown by the evidence that he would be in no better position by the restraining of the defendant's operations, and the water was proved to be impure when it entered defendant's dam.

Barlow, on the same side.—The case of

Gaunt v. Fynney, L.R., 8 ch. App. 8,

is a very recent authority as to the manner in which the Courts deal with such cases as the one now under consideration, and also as to the *onus* being on the plaintiff to make out a case substantially in accordance with the allegations of his bill. Evidence also cannot be substituted for pleadings—

Whitworth's Precedents.

A reference to the evidence will show the requisite above referred to has not been complied with, as all the testimony which has been adduced proceeds either on assumption, consideration, hearsay, or belief; even the scientific witness admitting that he has not analysed the water which flows from the defendant's premises, and which he simply said *must* contain animal matter. Mr. Spinks also, who had evidently been set to watch the dam with a view of seeing whether it was flushed out, could not say that he had ever seen it let off; and the plaintiff only *accounted* for the flushes by the raising of the dam. It is to be observed, too, that there is a clear distinction between permanent and intermittent nuisances, and in the latter case a reversioner would have no right to apply for an injunction—

Swaine v. Great Northern Railway Company, 33 L.J. (N.S.), ch. 399.

There is a suspicious peculiarity in the fact that Mrs. White, the mother of the plaintiff, who had resided on the property for so many years, and consequently would have been able to speak positively as to its past and present value, has not been called. Again, the pleadings frequently mention other persons as contributing to the pollution of which the plaintiff complains, and there is a clear inference that by the defendant's operation alone no appreciable injury would be done, and that inference was established by the evidence. But to obtain an injunction a serious portion of the alleged injury must be unmistakably traced to the defendant, irrespective of anything done by others. The case set up, however, is that there has been a gradually increasing contamination of the water from the year 1847; but though a larger number of men have been employed by the defendant recently, yet that has been satisfactorily accounted for; and further, it is shown that latterly a much less quantity of soap and soda, the principal elements of pollution, has been used in the woolwashing. In considering the scientific evidence it is to be remembered that the Courts have held even such testimony to be subservient to reliable facts. As to Dr. Elphick's statements that sickness and death were attributable to the poisoning of the air

and water, on looking into the cases it will be seen that at least the one of the infant nine months old was unworthy of important consideration, as a child of that age is liable to manifold complaints. The time when the death occurred, too, was in April or May, three months after the defendant's busy season. All the illness was in a locality low, damp, and swampy, and therefore particularly conducive to the generation of such diseases as dysentery and typhoid fever. With regard to the plaintiff's business as a grazier being affected by the river being rendered practically useless, it becomes a question whether he has not in a great measure destroyed its utility himself by his so-called improvements in widening the bed of the stream, creating thereby the very mischief of which he complains. The necessary effect of extending the volume of water over a larger surface would be to form a greater and more superficial deposit of sediment from the sewage. But whatever may be the truth of that proposition, and whatever position the defendant is in with reference to contributing in the prejudicing of the riparian rights of the plaintiff, it is clear that inasmuch as it has been admitted that other persons are at least in some degree co-responsible for the injury inflicted, the duty is cast on the plaintiff to have joined all the offending parties in his bill, and as he has not adopted that course such bill was improperly framed. That is the most recent law—

Thorpe v. Brumfitt, L.R., 8 ch., App. 650.

The defendant ought also to have been interrogated or cross-examined as to the extent of his operations in the river. Turning to the *laches* or acquiescence with which the defendant charges the plaintiff, the *onus* was on the other side to have explained away and accounted for by the bill the *prima facie* justice of the position taken—

Cooper v. Hubbuck, 30 Beav., 160.

And further, the proof of the increase of a nuisance would not entitle the plaintiff to an injunction for its entire removal, but merely a restraint from the extraordinary injury sustained—

Gale v. Abbott, 8 Jur., N.S., 987 ;

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

and it would be a fraud on the defendant if delay in taking proceedings was the cause of mischief to him—

Saunders v. Smith, 7 L.J., (N.S.), ch 227
Whitworth's Precedents, 369.

(GWYNNE, P.J.—The defence of acquiescence is raised by the answer, and the object of pleading is to succinctly state the issues. If that be not done the plaintiff suffers an injustice.) The acquiescence should have been explained away by the bill, and the plaintiff was bound to have done so satisfactorily. The defence, also, was negatively if not expressly raised by the answer. With reference to the past and present condition of the stream, there was evidence that even in the year 1848, a year after the defendant's works were started, the water was unpalatable, and stock refused to drink it in 1848, 1853, 1860, and 1862.

Cur. ad. vult.

Way, Q.C., in reply.—Only where the title is in dispute or the injury denied is a plaintiff compelled to first establish his position at law. It cannot be attempted to be disputed that Equity will interfere to prevent the introduction of an evil, and it is ridiculous to say that after the wrong has been actually committed the injured party would have to seek the intervention of a Court of Common Law before obtaining redress. If Equity has no jurisdiction without an appeal to law, a bill would be demurrable. In the argument of the point by the other side the authorities have all been inverted in point of time, the cases before Rolt's Act having been first quoted, and then the more recent decisions, and by pursuing that ingenuous course the endeavour has been made to suppress the fact that latterly Courts of Equity never send a suitor back to law. But the plaintiff contends that Sir John Rolt's Act, which makes it compulsory on the Court to take the whole responsibility upon itself, is in force in the province, being included in the general equitable jurisdiction vested in the Court by the Equity Act, though irrespective of that enactment he is entitled to urge the Court to decide the suit. In considering

the doctrine of equity on the question of reference to a jury, there are three Ordinances which specially deal with the subject. First, there is the Chancery Amendment Act, 15 and 16 Vict., c. 86, secs. 61 and 62, which, in conjunction with the equitable powers with which the Common Law Courts are clothed by the Procedure Acts, was intended to correct the patent abuse then existing of one remedy being obtainable in one Court, and another under the other jurisdiction. That Statute, however, did not provide for the trial of issues at law; and then came Lord Cairns's Act, 21 and 22 Vict., c. 27, investing the Chancery Judges with a discretionary power in the matter. But under that Act there was an evident disposition on the part of the Equity Courts to evade the responsibility of adjudicating on questions of fact, and this led to the passing of Rolt's Act, 25 and 26 Vict., c. 42, throwing the whole *onus* on the single tribunal. Coming to the position of the Court here in its equitable jurisdiction, it is a perversion of justice to suppose that a jurisdiction so highly useful as the one in question is not given by the sweeping language of the Act, which invests the Primary Judge with all the powers of the Lord Chancellor, and in the case before the Court it would be a gross scandal on the administration of the law to say that the immense amount of time and money which has been devoted to this case only serves to decide whether or no the suit is a fit one to be referred to a jury. The authority relied on by the other side can clearly be distinguished from the present case, as they were all in their inception, having been decided before the evidence was taken, the motions being for interlocutory injunctions. (GWYNNE, P.J.—As to the Court here possessing a like jurisdiction with the Lord Chancellor in England, reference has been made to the decision in the case *re Johns*. The question there, however, was whether a Statute, conveying special and extraordinary powers in opposition to the Common Law rights, had been re-enacted here by implication under the section of the Equity Act which had been referred to.) Passing to the consideration of whether the pollution of the river has been traced to the defendant, it was shown that at the Railway Bridge, despite the sewage, the water was at any rate freely drunk by stock. The contributory

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

polluting, however, has been very greatly exaggerated. According to Mr. Francis the Torrens is nothing but an open sewer; but such a state of things is not supported by the other witnesses. There is both independent testimony and ocular demonstration by samples of the palpable difference between the water as it left Peacock's dam and that of the defendant. In the former the analysis disclosed only $17\frac{1}{2}$ grains of organic matter to the gallon, while in Mr. Taylor's dam the water gave 57 grains, including 17 of a fatty nature. The sample taken from Peacock's works represented in addition all the fellmongery operations above them. Mr. Francis is not entitled to great weight, on the ground that on his own admission his knowledge is only theoretical, he stating that he never saw wool scoured, and has not examined the river below the defendant's premises. With regard to the *laches* sought to be charged to the plaintiff, the facts show that Mr. White has used due diligence. In 1865 he first noticed the water contaminated, but it was not till December, 1868, that the cattle refused to drink it. He then at once proceeded to examine the river, and having discovered the cause of the mischief in May of the following year he got the circular signed by his co-riparian proprietors, and sent it to the fellmongers in July. But the winter was then at hand, and he discovered that the cattle—undoubtedly owing to the larger body of water—drank at the river again till September. In November the water became very much affected, and therefore the notice was given to Messrs. Peacock as to the suppression of the nuisance. On the 17th of that month the meeting of those interested in fellmongering operations was held, and consequently, and also because the river stopped flowing, and the woolwashing had to be almost entirely suspended, the plaintiff took no further steps. In April, 1870, the defendant and others resumed their operations; but the heavy floods about that time carried off the injurious effects, and it was not till the following December that the plaintiff was again made unpleasantly conscious of the existence of the nuisance. He then consulted his solicitor, and the present suit was the result. The whole extent, then, of the alleged acquiescence is thus satisfactorily accounted for. The foundation of the equitable doctrine

as to delay is estoppel, but it has only been applied to short spaces of time in cases of interlocutory injunctions, pending the decision of legal rights. A mere lapse of time, however, is not sufficient to put the plaintiff out of Court, but it must be accompanied by something amounting to fraud, otherwise acquiescence would become more formidable than the Statutes of Limitation. But even in interlocutory cases the Court has interfered when six years' apparent acquiescence has been proved. The question should have been raised by the pleadings, either in the answer or on demurrer. In reference to whether all the copolluters should have been joined in the bill, it has been shown in the opening of the case for the plaintiff that such a defence is untenable, unless it could be proved that the parties whom it was contended should have been joined acted in concert with the defendant. On the form of the degree it is asked that it may, if granted, include an order for the removal of the dam, as it is clearly the means of intensifying the injuries complained of; the damages to be awarded also should extend subsequent to the institution of the suit.

Cur. ad. vult.

10 March, 1874—

GWYNNE, P.J., now delivered judgment, as follows :—The parties in this suit are riparian proprietors on the River Torrens. The defendant, long before and at the time of the commencement of this suit, carried on the business of a currier or woolwasher at Hindmarsh, near Adelaide, and had during the time he so carried on that business been in the habit of using the water of the river for the purposes of his trade. The plaintiff is a landholder and grazier, living about three and a half miles lower down the river at a place called the "Reedbeds," and he complains against the defendant that he, in the manner of carrying on his trade, pollutes the water and bed of the river to such a degree as causes to the plaintiff great injury and loss. As the only difficulty I feel in coming to a decision in this case arises from the state of the record—that is, a difficulty in being sure that I seize the precise issues raised—I shall presently state the bill and answer more fully than

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

I otherwise would have done. I would, however, premise that the River Torrens, so far as the evidence shows, or I know, is a natural stream. It has its source in the hills to the east of Adelaide, and continues its channel down in a westerly direction towards the sea. Like most Australian rivers its waters undergo great changes, sometimes, according to the season of the year, rushing as a headlong torrent; sometimes subsiding into a chain of mere waterholes. In its natural state, before it was polluted, the water was pure and fit for all purposes, domestic or otherwise, and the bottom of the channel was clean; and in the early period of the colony (before the waterworks was established) the Town of Adelaide drew its supply from the Torrens. Perhaps it is unnecessary to observe that the Torrens is a non-navigable river. It has no sea mouth, and consequently no flux and reflux of tide, but when its waters reach the Reedbeds they spread out and form a marsh, though much of the water eventually finds its way into the sea by means of a creek near to the sandhills there. The river has not received much attention from the local Legislature; yet they have looked to the necessity of keeping it pure, and with that view by the Municipal Corporations Act, 1861, ss. 68 and 70, have vested the conservancy of the river within the limits of the city in the Corporation, and forbidden any person to put into the water of the river within such limits any offal, filth, or offensive matter. The evidence, however, in the case now before me, and particularly that of Mr. Francis, prevents me from saying that, in my opinion, the Corporation of Adelaide have performed their duties with that vigilance which the Legislature intended, and the public had a right to expect at their hands. The plaintiff in his bill sets out his title under his father's will to the sections, and part sections, of land in respect of damages to which he complains. He is tenant for life of that property, with remainder to his first and other sons in tail male, with remainders over. But as respects the house in which his father resided (and which appears to be the only dwelling house on the property), with the yards and appurtenances thereto belonging, and comprising not less than five acres, portion of Section 194, it is given to the plaintiff's mother for her life; consequently he is seised, not in

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

possession, but in reversion expectant upon his mother's death. The bill then sets out, as in a picture, the beauties of the property, and avers that until the year 1865 the river flowed through the property in a clear stream, having a clean sandy bottom, and having in it a large number of native fish, and that the water was very good and fitted for culinary and domestic purposes. The bill then states that the plaintiff has, since the death of his father (he died 30th December, 1860), carried on the business of a grazier and agister of cattle upon the said property, and has divided the sections into several paddocks, and has made considerable profits thereby, and that in the summer time particularly there was abundance of grass in the paddocks. In the 9th paragraph the bill states that the defendant commenced the business of a fellmonger and woolwasher in 1847, and has continued to carry on the said business from thence up to the present time, and has during such period washed wool and sheepskins, and the wool obtained from a certain process of sweating sheepskins, in the stream of the said river, or on his premises abutting on the same, and has placed thereon, or turned, or allowed to run or flow into the said stream, the soda, soap, and other materials used in such washing, and the dirt, filth, grease, and animal matter and refuse washed out of such wool and sheepskins, and the wool obtained by sweating sheepskins; but that when defendant commenced his business the same was small in extent, and the material so used in such business, and the matter so washed out, was for several years very inconsiderable, and did not affect the land of the plaintiff to a sensible extent, but the defendant's said business gradually increased, and particularly about six years ago the quantity of wool and sheepskins, and wool obtained by sweating sheepskins, which was washed by the defendant, so much increased that the effect of the soap, soda, and other materials used by him in woolwashing, and the dirt, filth, grease, and animal matter and refuse washed out of the wool and sheepskins, and turned or allowed to flow into the said river, began to have a perceptible effect on the water of the river as it flowed into the plaintiff's said premises, and the water is now, and has for some time past, been caused to be foul, noxious,

and offensive, often of a dark colour, sometimes very thick and black, with a thick greasy scum or froth on the surface, and it then deposits a very thick black mud in the bed of the river, and a greasy scum on the sides of the banks. The bill then states that in consequence of the pollution of the stream the fish are killed; horses and cattle will not drink unless compelled by excessive thirst; that the water is unfit for washing and all domestic purposes, and the stench from the river is very great and offensive; that there is a dam across the river at the defendant's works, in which the water is impounded to the depth of several feet, and in which the defendant washes wool, and renders very foul; that defendant, when flushes from rain come down the river, is in the habit of discharging the offensive and impure water, and of scouring and cleansing the bottom of the dam, and causes the impure water thus impounded to flow to the plaintiff's property. The bill then states the great damage occasioned to him by the conduct of the defendant, and also facts which were intended to repel the conclusion that the plaintiff had been guilty of delay and *laches* in asserting his right. The prayer is—1. That the defendant, his workmen, agents, and servants may be restrained by the injunction of the Court from placing, or throwing, or turning, or causing, or allowing to run or mix with the said stream or River Torrens any noxious or deleterious fluids or substances, whereby, or in consequence whereof the water in the said stream or river, where it runs through or near the plaintiff's premises is or may be fouled or polluted, or rendered noxious or offensive; or whereby, or in consequence whereof, the plaintiff is or may be injured or affected in the comfortable or beneficial enjoyment of the house and premises devised to him by the said title. 2. That the defendant pay costs of the lawsuit. And 3. For general relief. The defendant, by his answer, states that he has conducted the business of a fellmonger and woolwasher, for more than twenty-four years, commencing from about the year 1847, and that he has washed wool in the stream of the said river, and has allowed to run into the said stream the refuse of such washing, including the soap and soda used in such washing, and the dirt, filth, grease, and animal refuse washed out of such wool,

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

but in very small quantities, because of the process used by him, which he gives in detail. He further states that there is a dam across the river at his works, in which the water is impounded; and by his further answer he states thus—"I do wash, and have washed wool in the water impounded, as in the fourth paragraph of my former answer is mentioned." The answer then goes on to state as follows:—"I submit to this honourable Court that I and those under whom I claim have for upwards of twenty years continued in an uninterrupted use of the said water in the manner in which it is now used by me, and that by reason thereof I ought not to be disturbed in such use." Now it appears to me that the questions raised by the pleadings, and they are questions of fact, are—First. Is the water of the river so foul and polluted at the plaintiff's land as that the fish are killed, and that it is unfit for cattle to drink? And secondly. Is that pollution in all or in part caused by those acts of the defendant complained of by the plaintiff in his bill? As to the first question, I am satisfied from the evidence that it must be answered by the affirmative. And here I may observe that the statement in the answer of the Statute of Limitations was ill-advised, for it is altogether nugatory. The defendant does not pretend in that statement that he has acquired any specific right or easement by long user in the waters of the river, but only the right "of user of the water in the manner now used by him." But what is that manner of user now exercised by the defendant? Why, his whole answer, in divers parts and in different language, is to the effect that he does not pollute the water to any sensible or material extent. Then, according to my apprehension, the plea of the defendant merely amounts to this—that the defendant has used the waters in a manner which did not pollute them for upwards of twenty years. It seems to me absurd to say such a plea or statement can be any answer to the pollution and defilement of which the plaintiff complains, and attributes to the acts of the defendant. This defence, however, I understood on the hearing is abandoned. Then the other and most important question is—Do the admissions of the defendant and the evidence sufficiently show that the injury of which plaintiff complains, or any substantial part of it, is caused

by the acts of the defendant? And I am bound to say that I am compelled to the conclusion, not that all, but that a material part of the pollution is caused by the defendant's works. I have since the hearing, examined the evidence with great care, but as it is very voluminous, and in some instances contradictory, I do not intend to go into it at any great length here. I will, however, refer to that part of it which bears upon the fact of certain flushes of the river having taken place from time to time when there was no rain at the time to cause them. It is noticeable that plaintiff in his bill, and also in his evidence, speaks of flushes only after rain, and so do several witnesses. But I wish to speak of those to which the numerous witnesses on behalf of the plaintiff refer to as in their apprehension being immediately caused by something other than rain. Of the existence of these flushes I can entertain no doubt, for the fact is deposed to by some dozen or more witnesses, a great many of whom must be admitted to be among the class of most respectable colonists. The flushes are seen by some on Saturday, by others on Sunday, and by others on Monday and Tuesday, according as the witnesses live nearer to or further from the defendant's works. The appearance and nature of the water of the river brought down by these flushes is described by the several witnesses; they appear to be masses of foul and polluted water, and in appearance, composition, and smell, very similar, in short, identical with the water in the defendant's dam. Now, it is natural to ask the question if this corrupt mass of water does not proceed from the pent-up water at and above defendant's works, where does it come from? The waters pent back constitute a great mass, and, according to the witness Lenthwaite, extended up the river in the summer of 1871 and 1872 to within 150 yards of the Railway Bridge, and in 1870-71 it reached half way between Hindmarsh Bridge and the Railway Bridge. Now, it appears to me that the escape or the voluntary letting off of a portion of this pent-up water would account for the flushes, and rain being excluded I know nothing else that would. And it is noticeable that although the numerous witnesses who were examined upon the subject, with the exception I shall presently notice, candidly admit that they never actually saw the boards of the dam taken

up or the waters let off; yet it is clear they all have a theory upon the subject in their own minds. But what before may be said to rest in theory is made very certain and clear by the evidence of John Allen and James Cutts. Allen says:—I have seen the men at work in the river washing the wool. He means at defendant's works. He then proceeds:—"I have seen the water come away from the dam where they were washing the wool muddy and nasty, and I have seen them take up the boards of the dam on a Saturday afternoon, and the water that came away from the dam was black and nasty, and not fit for anything to touch." In cross-examination he is asked, "How often have you seen the boards taken out of defendant's dam on a Saturday afternoon?" He answers, "About a dozen times." He is then asked, when? Answer—"Once or twice in each year." Question—"What time of the year?" Answer—"In the summer time." Question—"Was there a flood at the time?" Answer—"I could not say there was; the water was just running over the top of the dam." He is then interrogated as to how many boards were taken up. He answers, "Two or three." This witness does not so clearly distinguish between flushes coming after rain, and the other kind of flush constantly referred to by the previous witnesses, as is desirable; but it appears to me he means that the boards were taken up on the Saturdays irrespective of the circumstance of rain or no rain. Then comes Cutts. He worked at wool-washing for defendant at his works. He went there in 1868, and left in January, 1872. This witness, after describing the dam and the manner of letting off the water, proceeds thus—"The water is generally let off when there is an appearance of rain to refill the dam. It is generally let off on Saturday afternoon when the men knock off work. It is let off to clear the dirty water away so as to get the dam filled with clean. At the time of the letting off the water the bottom of the river inside the dam is stirred up to make it all go down of a heap. It is stirred up with hoes and sticks. I have helped to remove the dam, and to stir up the sediment. . . . The sediment smelt when stirred up. . . . Sometimes all the water was left off from the dam." On cross-examination he says—"The water can be let off from the bottom without taking up all

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

the boards of the dam. By letting the water off I mean taking up all the boards, and emptying the dam. I could not say how often this was done while I was there; it was not done every Saturday. I am sure this (meaning the taking up of all the boards and emptying the dam) was done twenty times. I can't say if it was done fifty times during the four years I was at defendant's." He is pressed upon this subject, but adheres to his statement. He is lastly asked, "Are you sure the water at defendant's has ever been let off in summer time, except when there has been an increase of water caused by rain?" Answer—"It has when there was an appearance of rain to cause an increase of water." This witness says a great number of men, sometimes sixty, were working at defendant's works at the same time that he was, and his evidence is that he merely assisted or helped to remove the dam and stir up the sediment; yet he is never asked in cross-examination the names of the other men who so worked at defendant's, nor of those who assisted him in removing the boards of the dam and stirring up the sediment. He gives his evidence knowing that, if untrue, he can be contradicted most entirely by many of his fellow-workmen, and with the chance of a conviction of the crime of perjury. No doubt some evidence is given by the defendant which goes to contradict Cutts; but there is nothing like the crushing contradiction that the circumstances challenge, and which, if it could, no doubt would have been produced. I come, therefore, to the conclusion that not only does the defendant materially and to a great extent pollute the river, but, also, that the water so polluted by him reaches the plaintiff's land, and causes, at all events in part, the nuisance of which he complains. I say causes in part, because evidence was given on the hearing to show that the river was much polluted by a nest of factories adjacent to and higher up the river than the defendant's; and above all that it was polluted by the sewage discharged into it by divers public sewers, which are particularized in the evidence of Mr. Francis and other witnesses. But, according to the view taken by the learned counsel for the plaintiff, all these co-polluters of the river are wrongdoers; and no doubt *prima facie* they are so. Therefore, the stopping of the acts of the defendant will tend so restore the plaintiff to the enjoyment

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

of that right which he has established against the defendant. On this part of the case I quote the words of the Vice-Chancellor from his judgment in *Wood v. Sutcliffe*, 2 Simons, N.S., 166 :—"I say restore, or tend to restore, because I conceive it is no answer to an application of this sort for the defendant to say other persons as well as he are polluting the stream, and that, therefore, the injunction will not restore the plaintiff to the enjoyment of his legal right, inasmuch as it will not prevent those other persons from continuing to pollute the water, for the plaintiff must sue each of the wrongdoers separately, unless, indeed, they are acting in partnership or in concert together; and the obtaining of an injunction against any one of the wrongdoers, though it may not actually restore, does tend to restore the plaintiff to the enjoyment of his rights, as it is a step towards obtaining an injunction against each of them." And I would, on this part of the case, refer to the remarks of Lord HATHERLY, L.C., in *Attorney-General v. Leeds Corporation*, L.R., 5 Chancery, 595. But it is said that the plaintiff has been guilty of *laches*, and, therefore, according to the ordinary course of the practice of Courts of Equity, he has lost his right to the extraordinary interference of those Courts. No doubt, had this been an application for an interlocutory injunction, where mere delay—a want of vigilance merely in pressing his remedy—is fatal to the application, there would have been considerable force in the objection, but this objection comes against the granting of an injunction on the hearing. Therefore mere delay is unimportant. See the law clearly laid down by the V.C. in *Rochdale Canal Company v. King*, 2 Sims., N.S., 89. Again, in *Archbold v. Sculley*, 10 H.L. Cases, 383, Lord WENSLEYDALE well marks the distinction between simple *laches* and acquiescence. He says—"So far as *laches* is a defence I take it that when there is a Statute of Limitations the objection of simple *laches* does not apply until the expiration of the time allowed by the Statute. But acquiescence is a different thing; it means more than *laches*. If a party who could object lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce ;

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay without losing his right I conceive cannot be an equitable bar." In the case now before the Court I cannot say that anything has been done or permitted by Mr. White, the plaintiff, which falls within the definition of acquiescence. Then it is said that the Court ought to follow the practice of the High Court of Chancery, as that practice was before the passing of the Statute 25 and 26 Vict., 42. There is no doubt that the former practice of the Court of Chancery was, in the cases of private nuisance, as a general rule, to send the parties to a Court of Law in order to establish their legal title, and it seems to me equally clear that the above statute is not in force in this colony. But on looking into the authorities I do not find that it was ever an inexorable rule to send the plaintiff to law in cases of private nuisance. Story, in his work on Equity Jurisdiction, vol. 2, 251, states the practice in accordance with what I venture to think was the law. His words are :—" But the question of nuisance or not must, in cases of doubt, be tried by a jury, and the injunction will be granted or not as that fact is decided." Then, at all events since the passing of the Statute 21 and 22 Vict., 27, which is substantially introduced into this colony by our Equity Act, it is clearly optional with this Court to send the plaintiff to law to establish his legal title, or to try it before this Court, either with a jury or before the Court (the Primary Judge) without a jury. And I refer, for a legislative recognition of the circumstance, that it was optional with the Court since the passing of 21 and 22 Vict., 27, to send the plaintiff to a Court of Law, to the Statute 25 and 26 Vict., 42, in the preamble, " Whereas the High Court of Chancery has *power* in certain cases to refuse or postpone the application of remedies within its jurisdiction until questions of law and fact on which the title to such remedies depends have been determined or ascertained in one of Her Majesty's Courts of Common Law ; and whereas it is expedient that the said *power* should no longer exist, and," &c. In the present case the title of the plaintiff to his estate at the Reedbeds, or his Common Law rights as a riparian proprietor, are not disputed ; and the fact of the pollution of the river at his place is scarcely, if at all, denied,

SUPREME COURT.

WHITE v. TAYLOR.

EQUITY.

the contention being only that the defendant, by anything done by him at his works, did not cause the pollution complained of. As I have already observed, this, to my mind, is not a case of doubt. I am convinced upon the evidence that a great and substantial part of the pollution and consequent wrong to the plaintiff is occasioned by the defendant's works. I feel, therefore, that it would be a scandal on the administration of justice to send this case to a jury, and even a greater to bring it before myself without a jury, which it cannot be disputed I have the power to do. Then see *Eaden v. Firth*, 1 H. & M., 572, Before I conclude I wish to say a word or two with respect to the house and five acres of land vested in plaintiff's mother for her life. The plaintiff has a reversion in the property for his life, and although, probably, the injury to that reversion is sufficiently permanent to give him damages in respect to that injury also, yet the bill does not, I think, make a case for damages in respect of injury to the plaintiff's reversion. As, however, there may be some doubt upon this, and some difficulties, in other respects, in my way to assess the damages, I propose to give the plaintiff leave to proceed at law for the purpose of recovering damages. If, however, the defendant prefers the damages to be assessed before this Court with a jury, I will adopt that course. The injunction is granted in the terms asked, omitting the words "house and."

Injunction granted.

SUPREME COURT.	{	DISTRICT COUNCIL OF GLANVILLE, EX PARTE H. B. T. STRANGWAYS.	}	EQUITY.
----------------	---	---	---	---------

GWYNNE, PRIMARY JUDGE.]

[EQUITY.]

24 MARCH, 1874.

IN THE MATTER OF THE DISTRICT COUNCILS ACT, 1858, AND IN THE
MATTER OF THE DISTRICT COUNCIL OF GLANVILLE, EX PARTE HENRY
BULL TEMPLARS STRANGWAYS.

*DISTRICT COUNCILS ACT OF 1858, Section 186. Reputed owner
—Order for Sale.*

Section 186 of the District Councils Act of 1858 empowers the District Council, after the rates in respect of any property have been in arrear for more than two years, to publish in the Gazette certain notices addressed to the owner or reputed owner of the property of their intention to apply to the Court for an order for sale of the land; or, should the owner be unknown, the notice to be addressed "To all whom it may concern."

The District Councils Act also provides that all appeals against assessments must be made within a specified time.

A was the owner of an allotment of land which had been conveyed to him by his father, but which was generally considered in the neighbourhood to belong to B. On one occasion application was made to A for rates due by him in respect of property in the same District, such application not specifying any particular allotments, but A had declined on the ground that the assessment was excessive. Subsequently, the rates having been in arrear for a lengthened period, notices as required by the Act were published in the Gazette, directed "To all whom it may concern," but specifying B as the reputed owner of the land in the schedule to the notice required by the Act; and pursuant to such notices, application was made to the Court and an order for sale obtained, which was subsequently set aside as irregular, and a new order granted. In the interval between the original and subsequent order A's attorney offered to pay all arrears due, which was declined, but an offer was made on behalf of the Council to withdraw the allotment on payment of all arrears and costs.

The affidavit as to reputed ownership simply set out that B was generally considered to be the owner, without stating on what grounds.

A having obtained an order nisi to set aside the order for sale,

Held—That A having been applied to for rates and declined to pay had deprived himself of all equity.

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE, } EQUITY.
 { EX PARTE H. B. T. STRANGWAYS. }

Quære—Whether, if A had not been so applied to, the notices would have been sufficient?

The affidavit should set out not merely the fact of reputed ownership, but also the grounds on which the same is based.

The procedure by order nisi in place of notice of motion was objected to, but the objection was over-ruled.

ORDER *nisi* calling upon the Glanville Council to show cause why the order for sale of Allotment 8, Port Adelaide, for arrears of rates, should not be discharged.

The affidavit in support of the order set out that in September, 1872, an order for sale of certain allotments at Glanville had been obtained; that in the May of the following year the owner's attorney offered to pay whatever rates were due for allotment No. 8, Port Adelaide. That in the following June the order for sale had been set aside as irregular, but a subsequent application was made under which a *pro forma* order was granted. On the other hand, it appeared from an affidavit of Mr. Measday, formerly clerk of the Glanville Council, that on one occasion application had been made to Mr. Strangways, the owner, for payment of rates, who had declined on the ground that the assessment was excessive; that no particular allotment was mentioned in such application; that the allotment No. 8 had always been considered the property of Mr. Dunbar, and that Mr. Strangways had never paid any rates in respect of it. From an affidavit of the clerk to the Council's solicitor it further appeared that, on a representation being made that the allotment belonged to Mr. Strangways, an offer had been made to withdraw the same from sale on payment of all arrears and costs. A further ground relied on in support of the order for discharge was that the notices required by clause 186 of the District Councils Act had specified Mr. Dunbar as the reputed owner of the allotment. Schedule 186 of the District Councils Act, 1858, provides as follows:—

“In any case in which rates hereafter to be made, in respect of any rateable property situated in a district shall be due, and unpaid, and in arrear, for the space of two years, it shall be lawful for the District Council by whom the assessment was made, whereon the rates in arrear

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE, } { EXPARTE H. B. T. STRANGWAYS. }	EQUITY.
----------------	--	---------

were due, at any time after the expiration of one year, to cause to be published three times in the *South Australian Government Gazette* a notice, in the form of Schedule J to this Act annexed, addressed to the owner, or reputed owner of the rateable property when known, and when the owner or reputed owner is not known, addressed to all whom it may concern; and if, after one year from the last publication of the notice, the rates due at the time of the first publication thereof are still unpaid, the District Council may let the same from year to year, and may receive the rents, apply the same towards the payment of the rates, and hold any surplus for the owners of the land, or by petition to the Supreme Court or any Judge thereof may apply for a sale of the rateable property described in such notice, or of so much thereof as may be necessary; and the Court or Judge, on being satisfied by affidavit or otherwise that the arrears are lawfully due, and were in arrear at the time of the first publication of such notice, and that all things required by this clause to be done have been done, shall order the sale of the said rateable property, or so much thereof as may be sufficient to pay the arrears and interest, at five per centum per annum, from the time of the first publication of the notice, together with all costs of and attending the notice, and the costs of and attending the application, and of and attending the sale by public auction, and the proceeds to be paid into Court; and the Court or a Judge may order payment of the said rates, interest, costs, and expenses, in preference to any mortgage or other security; and that a conveyance shall be executed by the Master or other officer of the Court, to the purchaser, his heirs, and assigns, in such form as shall be approved by the Court or a Judge, which shall vest the legal estate in the said rateable property in the purchaser, his heirs, and assigns free from all incumbrances; and the balance arising from the proceeds of such sale shall remain and be subject to any future or other orders of the Court, for behoof of the party or parties interested therein."

Belt now moved that the order be made absolute.

Way, Q.C., showed cause. The application is on the Equity side of the Court, but the Common procedure of a rule *nisi* has been adopted. The only reason that can be suggested why that has been done is that there is a desire on the part of the applicant to swell costs by the double set of fees which the Common Law practice necessitates. The primary objection, then, to the application before the Court is its irregularity, and on that ground alone it should be dismissed and the Council not called on to answer it.

Belt.—The practice already recognised by the Court, 6 S.A.L.R., 117, has been followed. (GWYNNE, P.J.,—I have before called attention to the fact that there can be no such thing as a rule *nisi* in

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE, } { EX PARTE H. B. T. STRANGWAYS. }	EQUITY.
----------------	---	---------

Equity; but the Common Law term has evidently been inadvertently used for the Equity one, Order, which is the form generally taken by summonses in Equity. I do not think I should allow the technical objection. As to the general aspect of the case, I feel some doubt as to whether I have jurisdiction; but having already assumed that I have, the application must proceed. It is, however, almost impossible to administer the law according to such a wording as that of clause 186 of the Act.)

Way, Q.C., resumed.—In October, 1873, an order of the Court was obtained for the sale of a number of allotments of land in Glanville on which a long arrear of rates was owing. Amongst them was one of which a Mr. David Dunbar was the reputed owner. (GWYNNE, P.J.—What do you mean by a reputed owner? Was it he to whom in the neighbourhood the property was generally considered to belong?) Accepting the definition given as to what is a reputed owner, it will be seen that the Council have complied with the Statute in every respect. The affidavit on which the application is based affords no evidence as to reputed ownership, and does not disclose any enquiry or knowledge as to who has generally been recognised as owner of the allotment in question. On the contrary, the applicant's attorney admits having applied to the Clerk of the Council for information as to what were the numbers of the allotments belonging to his client, and what rates were payable in respect of them. (GWYNNE, P.J.—It appears to me that an application for payment of rates should have been made to Mr. Dunbar, whoever he was, and then the mistake would have been discovered.) Persons liable for the payment of rates are in the same position as all other debtors, and are bound to seek out their creditors. On the merits, however, the Council will be shown to be in the right, inasmuch as it will be proved that an application was made to the applicant, and he repudiated his liability to pay. The letter addressed to the Council, and relied on by the other side, did not give any information as to the allotments in respect of which Mr. Strangways claimed, and though that gentleman must have been on the assessment-books of the District since its foundation, no steps were taken in

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE, }
EXPARTE H. B. T. STRANGWAYS. } EQUITY.

reference to his property until four months after the order for sale had been applied for, and in the meantime the land was reputed to belong to a Mr. Dunbar. That the attorney for the applicant did not know of his own knowledge that his client was recognised as owner is clear from his affidavit. (GWYNNE, P.J.—The power conferred by the Act is a most extraordinary one, involving the forfeiture of property, and I shall certainly construe it most strictly against the Council, although I shall be bound to administer the law according to practice and precedent.) I think I can satisfy the Court that everything has been done in the strictly regular way. (GWYNNE, P.J.—I conceive the applicant bases his case on the facts of actual ownership. My own opinion, and I believe that of my learned colleagues, is that the Act was only intended to be put in force in cases of positive necessity. I understand that, as a matter of fact, three allotments, with which he had nothing to do, were rated in Mr. Strangway's name, and the land really belonging to that gentleman was charged as against some one else. It certainly, then, was *prima facie* the duty of the Council to appoint proper officers in making an assessment to see that no such errors arose.) It is clear from the evidence adduced that every opportunity has been given to the applicant, who never claimed to be the owner of allotment 8 until after the order for sale was drawn up. It can hardly be conceived, also, how Mr. Strangways could have been ignorant of the fact that he was being rated in respect of the wrong allotments, and his duty clearly was to have communicated with the Council after the receipt of the usual notice of assessment. (GWYNNE, P.J.—I understand the proper course for the Council to adopt to be after rates are in arrear for two years, at the expiration of the third year to insert a notice in the *Government Gazette*, and on a fourth year elapsing sale may be made.) All those questions have been disposed of on a previous argument. The only point raised by the application is as to ownership. It is contended that nothing should have been done after the receipt of the letter written by Mr. Strangway's attorney, but that communication was of a most indefinite character, and certainly contained no tender of money in payment of the rates.

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE, }	EQUITY.
	{ EX PARTE H. B. T. STRANGWAYS. }	

Bell, in support of the order.—The real question before the Court is set out in the order *nisi*, which states that a sale was made after payment had been tendered. The only object of the remedy provided by the Statute is to provide a means for obtaining what is owing for rates after all other means have failed. The facts briefly are that in September, 1872, an order for sale of certain allotments was obtained ; that in May, 1873, an offer to pay the rates due by the applicant was made ; that in the June following the order was discharged for irregularity, but subsequently was made in an amended form in October, 1873. It is quite clear that the duty was cast on the Council to have informed Mr. Strangways's attorney, in answer to his letter, of all the facts of the case. It appears the letter was mislaid by the Clerk of the Council, but the owner of the property could not be prejudiced by that. On the question of ownership, it is worthy of note that no complications appeared on the title. The land had been simply conveyed from father to son, and no tenancy had been created or agent appointed by which a presumption of reputed ownership might arise. The notice in the *Gazette* was simply calculated to mislead, as it gave the wrong names and an incorrect amount as due. If the owner had been put as "unknown" the difficulty might not have arisen.

GWYNNE, P.J., delivered judgment as follows :—There are two questions to decide—First, Has the District Council complied with the requirements of the 186th clause of the Act of 1858? An application was made to the Court for an order for sale of allotment 8, District of Glanville. Before that could be done it was necessary that rates for two years should be in arrear, and also that after the lapse of a stated period, due notice should be given in the *Gazette*. In inserting such notice the allotment in question was described as the property of a Mr. Dunbar. It should be remembered in reference to that error that rates are levied after an assessment has been made, and all ratepayers have an opportunity of seeing that their property is rightly described and equitably valued. Moreover, they are expected to assist the Council in making a true assessment. By a provision in the Act,

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE, }	EQUITY.
	{ EXPARTE H. B. T. STRANGWAYS. }	

all rates duly made, and not appealed against, are made legal and binding, and all persons not exercising their right of appeal are bound by the acts of the Council. It appears that Mr. Strangways was in the colony at the time such assessments were made, and he had had a fair opportunity of seeing that his rights were protected. The evidence, however, is that he chose to remain supine. The next question is, Whether the notice in the *Gazette* was properly addressed? The Act provides for the insertion in such notice of the name of the owner or reputed owner, or, if the owner be unknown, then it must be so specified. The Council say they had no knowledge of Mr. Strangways as owner of lot 8, but that Mr. Dunbar had been recognised as owner. Until the affidavit of Mr. Measday was considered there certainly seemed a question whether Mr. Strangways was entitled to relief; but the facts deposed to by the late Clerk of the Council as to Mr. Strangways having been applied to for payment of his rates, deprive that gentleman of all his equity. The affidavit in question is not so full as to reputed ownership as could have been wished, nor so full as for the future will be required in such cases, it being very desirable that evidence as to the means of knowledge of reputed ownership should be before the Court. The only remaining question is as to whether the Council have been guilty of any unjust conduct; but, taking into consideration the fact that Mr. Strangways had notice of his liability in 1867, it cannot be said that there has been anything harsh or improper on their part,

Order discharged with costs.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[TESTAMENTARY.

25 MARCH, 1874.

IN THE MATTER OF JAMES WHITTAKER, DECEASED, AND IN THE
MATTER OF THE PETITION OF WM. WHITTAKER, OF GLENELG,
COACHMAN.

*EVIDENCE OF HEIRSHIP.—Curator of Intestates' Estates—
Order for conveyance.*

The Supreme Court has no power to order a conveyance of the real estate of an intestate, vested in the Curator of Intestate Estates, to one claiming to be heir-at-law, even though no adverse claims be set up, until the question of heirship has been tried by a jury, and the proper course for such claimant is to establish his title in an action of ejectment, or by proceedings in Equity, when an issue would be directed.

Affidavits in support of any proceedings before the Supreme Court in its Testamentary Jurisdiction must, since the Act No. 11 of 1867, be headed "In the Supreme Court Testamentary Causes Jurisdiction," and affidavits not so headed cannot be admitted as evidence in such proceedings.

THIS was a petition filed by William Whittaker, of Glenelg, coachman, for an order directing the Curator of Intestate Estates to convey to the petitioner all the real estate of one James Whittaker, deceased, and to pay over to him all accumulations in rent in respect of the same. The petition set out that in the year 1859 James Whittaker, late of Norwood, was drowned on the wreck of the "Admella," on the south-eastern coast of the colony; that deceased died intestate, and administration of his estate was granted to the Curator; that the said James Whittaker was an only child, and had never been married; that the petitioner claimed to be heir-at-law of the deceased, as great-grandson of William Whittaker, grandfather of the deceased; that on hearing of the death of the deceased the petitioner left the United States, where he was living, and came to South Australia to take possession of the property; that the personal estate of the said deceased had been paid over to his half-brothers or their representatives; and that in 1864 the

SUPREME COURT. IN RE JAMES WHITTAKER. TESTAMENTARY.

petitioner commenced an action of ejectment to recover possession of the real estate of the deceased, but was stayed by an order of the Court on the ground that proceedings should be taken by petition on the ecclesiastical side of the Court.

GWYNNE, J.—Has the Court had any jurisdiction in the case? We are asked to make an order deciding as to who is the heir-at-law of the deceased, without sending an issue to a jury.

Way, Q.C., Boucaut, and Wigley for the petitioner.—The Testamentary Causes Act imposes certain duties on the Curator, and gives the Court jurisdiction in reference thereto. In taking the realty the Curator takes no estate, but simply holds the property until the heir-at-law comes in to claim it. The petitioner, then, is not in the position of an adverse claimant, but is only asking to be placed in possession of what he is entitled to, which has been vested in the Curator by an *ex parte* order of the Court. If a petition were presented adverse to the present claimant the petitioner would undoubtedly have to go to a jury, but that not being so, the Court can, in its summary jurisdiction, grant the relief prayed for. The original order, by which the Curator took charge of the estate, was made pursuant to section 21 of the Act 12 of 1848. (GWYNNE, J.—It appears to me the Curator is in an analogous position to a Receiver in Equity, against whom an action by an heir-at-law may at any time be brought without fear of intervention from the Court.) There is a practical difficulty, at any rate, as to the heir-at-law bringing an action in ejectment. The Curator is empowered to grant leases of the realty of intestates, and consequently the tenants would be entitled to quiet possession during the currency of their respective terms, and the Legislature could never have intended keeping the rightful heir out of possession a day after he could establish his right. Ejectment, therefore, would not be the universal remedy for heirs-at-law against the Curator. (HANSON, C.J.—I believe, as a matter of fact, there have been leases granted of the property of the intestate, and an application has been made to the Court for a reduction of the amount of rent at first fixed.) Returning to the authority by

SUPREME COURT. IN RE JAMES WHITTAKER. TESTAMENTARY.

which the Curator acts, the Act of 1848 was repealed by No. 11 of 1867, all proceedings under the old Act of course being protected. It is by virtue of clause 12 of the last-mentioned Statute that the application is made to the Court, to the jurisdiction of which the Curator is thereby made subject. (GWYNNE, J.—Though bound up with the Act the clause referred to can hardly be said to be a part of it.) What has been suggested only involves the point whether the proceedings should have been entitled “In the Supreme Court” or “In the Supreme Court, Testamentary Causes Jurisdiction.” All orders under the Act are now made in the latter form, and doubtless the Curator would have objected if any other heading had been used. (GWYNNE, J.—It becomes more than a simple question of form when it is remembered that no indictment for perjury could be sustained on an affidavit not properly headed. It is a question of mode of procedure also.) (HANSON, C.J.—I conceive that the title of the Statute, “The Testamentary Causes Act,” applies to all its parts.)

Stow, Q.C.—As I simply represent an officer of the Court, I may point out that the definition in the Act of the word “Court” taken with clause 12, would seem to confer jurisdiction. I do not contemplate pressing that point against the petitioner.

GWYNNE, J.—Section 6 of the Act, headed “Jurisdiction of the Supreme Court in causes Testamentary,” specifically defines what that jurisdiction is, and such definition is binding. The Court clearly only have power over personality.

Way, Q.C.—Section 6 of the Act deals purely with the testamentary powers of the Court, but in the other sections of the Statute collateral jurisdiction is given. By the Act there are two distinct jurisdictions—the one contentious, the other applying to the common form business. In contested suits both parties are represented; but, as against the Curator alone, that course cannot be adopted, as he cannot, being simply an officer of the Court, be proceeded against by an action by which absent parties would be bound. The petitioner, therefore, comes before the Court, praying

that the summary jurisdiction of the Court may be exercised, and the Curator ordered to do that which is right. It is to be remembered, too, that the Court has already acted as to the personal estate of the intestate.

It was then proposed to read evidence on affidavit in support of the petition.

Stow, Q.C.—I object to the evidence. In the first place, part of the testimony is not that of relatives, and on that ground cannot be received, as the evidence should be of the same nature as that required in tracing a genealogy. The principal objection, however, is that many of the affidavits were sworn before the petition had been filed, and consequently are not receivable. No charge of perjury could be substantiated on such evidence. The affidavits, also, are not properly headed as of the Court in its Testamentary Causes Jurisdiction, and further, cannot be used on the hearing of this petition, inasmuch as they have not been filed in a cause between the same parties relating to the same subject matter. The duty is clearly cast on the Curator of calling attention to any irregularity or defect in the mode of procedure by which property in his care is sought to be affected, especially when it is considered that the real estate of the intestate in question yields about £800 a year, and there is also between £3,000 and £4,000 in the Bank derived from it.

Way, Q.C.—In justice, as well as technically, the evidence should be admitted. If it were not, independent testimony of a most valuable character would be lost to the Court in enquiring into the case. The affidavits were made in reference to an application previously before the Court as to the administration of the personal estate of the deceased; and inasmuch as they were made in the matter of the administration of the estate, they are properly entitled. The Court has already acted on them, and if they were rejected now, the anomaly would be created of evidence having been received in reference to the personalty, and yet held to be inadmissible in considering the rights of the petitioner as heir-at-

law. It would be a manifest injustice to compel the expense being incurred of fresh affidavits. The Curator also has had long notice of the intention to use the evidence, and therefore, every opportunity has been afforded of enquiring into it. Again, in such a case as the one before the Court, the strict rules of evidence will not be enforced, as it is not sought to define the rights of parties or gain a decision which will be final and unimpeachable. The Court may fairly use every means of informing its conscience as to the justice of the case.

Boucalt on the same side.—The estate of the intestate is already under the charge of the Court, and everything available in relation to it should be considered on a question such as that raised by the petition. Had it not been for the amendment of the Testamentary Causes Act in 1867, also, the affidavits would clearly have been properly entitled. The object of the enquiry before the Court is as to the administration of the estate of the deceased, and there being no suit pending, and the Curator being simply an officer of the Court, evidence such as has been tendered ought not to be excluded.

Stow, Q.C., in reply.—The clear duty of the Curator is to take objections mentioned, he being in the position of a protector of property, and bound to see that everything in relation thereto is proved in the strictest and most regular manner. It has been said that the affidavits sought to be used have already been recognised by the Court in the same matter. That is not so, inasmuch as the duties and powers of the Curator in reference to realty are quite distinct from those exercised in regard to personalty, which alone was the subject of the prior application referred to.

Way, Q.C.—Before the amendment of the law in 1867 there would have been the same heading used to an affidavit in proceedings as to realty as to personalty. The point in contest now, also, is the same as that raised by the former application.

HANSON, C.J.—My learned colleague, Mr. Justice GWYNNE, is reluctant to give an opinion on the point raised, he not being

D

SUPREME COURT. IN RE JAMES WHITTAKER. TESTAMENTARY.

satisfied that the Court has any jurisdiction to entertain the petition. Although I am not quite sure I agree with my learned colleague in reference to clause 12 of the Act of 1867, I feel that the Court is being asked to do something which, so far as I am aware, is unprecedented. I have never heard of an heir-at-law establishing his title under a petition such as that before us.

GWYNNE, J.—There is a clear qualification expressed by the wording of the clause 12.

Stow, Q.C.—The difficulty arises from the fact of the Legislature having taken the English Statute as the model, and neglected to make special provision as to dealings with realty.

HANSON, C.J.—I have great doubt whether the Court has power to make an order placing the heir-at-law in possession of the real estate.

GWYNNE, J.—In England the Courts never decide on a claim as to an heir-at-law without giving the claimant the opportunity of going to a jury.

Way, Q.C.—The right to share in the administration depends on kinship, and that has been decided by the Court on affidavit. The Curator has the real estate in the same manner as he had the personalty, and the petitioner has as much a claim to be heard by the Court as had the claimants on the personal estate. The Court appears to wish to protect the interests of unknown parties to the prejudice of the petitioner, who, at any rate, has shown a strong probability that he is the rightful heir-at-law, but who, except on almost impossible terms, is denied the ear of the Court. Every course is closed to him. He cannot proceed in ejectment—(HANSON, C.J.—Why?) Because leases of the property have been granted. (*Stow, Q.C.*—Then he should go to a Court of Equity.) (GWYNNE, J.—When, of course, I should direct an issue to be tried by a jury.) The petitioner ought not to be sent to a jury, as that would practically amount to a denial of justice, there being

no available means of examining witnesses in Ireland, and even if there were it could only be done at immense expense. If the Court granted the order as prayed, what harm would be done, even supposing the claimant be not the rightful heir? When the true heir-at-law appears, the property could be recovered by proceedings no more expensive than those which the present petitioner is sought to be burdened with. The result of the decision of the Court will be that the Curator takes the estate, and a penniless heir-at-law is powerless. (HANSON, C.J.—I strongly sympathise with the petitioner, looking at the case from the point of view last suggested; but there are certain rules in force, which in the main are beneficial, and by which the Court must be bound.) There is no rule of law compelling the petitioner to go to a jury. (HANSON, C.J.—But you must show us that we have the power to make an order putting the heir-at-law in possession.) Supposing the Curator had funds in his hands which he refused to hand over, the Court would surely then step in to compel him, by its summary jurisdiction, to do what was right. Where, then, is the difference in principle which would prevent a like course being resorted to in the case of a real estate? But, further, the petitioner is quite willing to give good security as to his *bona fides*, and, if necessary, leave the actual cash in the care of the Court until such time as it shall think further delay unnecessary. If, as suggested, the petitioner went to Equity for the relief he sought, his bill would be open to demurrer as to parties, or the Curator, if an account was asked for, might reply that the application should be made on the Testamentary side of the Court. It may be pointed out, too, that a Court of Equity informs itself by every possible means; and why, under the circumstances, cannot this Court do likewise? (GWYNNE, J.—Ethically the learned counsel is doubtless right, but the Court is here simply to administer, not to make law. If the Legislature empowers the Judges to deal out justice according to the circumstances, and under the guidance of their own consciences, a more perfect and satisfactory administration of the law would result, and then, and not till then, I should feel justified in doing what is wished.) With regard to the case under

SUPREME COURT. IN RE JAMES WHITTAKER. TESTAMENTARY.

consideration, the Legislature has conferred that power. (HANSON, C.J.—I will put another supposititious case. Supposing a man was said to have been drowned, and, he being intestate, the Curator in due course proceeded to administer the estate, but after the lapse of some time the man put in an appearance?) The Court would in such a case do substantial justice by exercising summary jurisdiction, and ordering the Curator to surrender the estate. (*Stow, Q.C.*—Not until the identity of such a claimant with the supposed intestate had been duly found according to law.)

HANSON, C.J.—The majority of the Court are of opinion that it has no jurisdiction to grant the prayer of the petition.

Stow, Q.C.—Then the petition will be dismissed. I am bound to ask for costs.

Way, Q.C.—But they will come out of the fund.

HANSON, C.J.—Yes.

Petition dismissed.

SUPREME COURT.

IN RE STANLEY.

COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

30 MARCH, 1874.

IN RE STANLEY.

SERVICE ON JURIES.—Consul—Exemption.

A Consul of a foreign power resident in this Province cannot by virtue of his status claim exemption from service on Juries under the existing Jury Act.

IN this case Frederick Stanley, the French Consul, was fined £25 for non-attendance as a juror.

Stow, Q.C., moved that the fine be remitted. No doubt under the Act Mr. Stanley personally would be bound to serve under ordinary circumstances; but the question is, whether, as a matter of international law, a Consul can claim exemption. I think that, as a subject of the Queen, Mr. Stanley was bound to attend; but under the circumstances I would suggest that the fines be remitted.

HANSON, C.J.—It seems to me that the Court has no option.

WEARING, J.—In the prior act the exemption was specially mentioned, but in the existing Statute no such distinction has been recognised.

GWYNNE, J.—It appears to me that Mr. Stanley's name being on the Jury Roll, and the Statute compelling him to serve, the Court can only administer and enforce the fines.

HANSON, C.J.—The Government might interfere, but the Court has no option.

Fines enforced.

SUPREME COURT. IN RE THE WILL OF JAMES MASTERS.

EQUITY.

GWYNNE, PRIMARY JUDGE.]

[EQUITY.]

31 MARCH, 1874.

IN THE MATTER OF THE WILL OF JAMES MASTERS, DECEASED, AND IN
THE MATTER OF THE LANDS CLAUSES CONSOLIDATION ACT AND
THE BURRA RAILWAY ACT, 1869.

*LANDS CLAUSES CONSOLIDATION AND THE BURRA
RAILWAY ACT, 1869. — Tenant in tail — Compensation
Money.*

*A tenant in tail in possession of land taken by the Government for
railway purposes under the Lands Clauses Consolidation Act and
Burra Railway Act, 1869, is entitled to the receipt of the whole
of the compensation money awarded in respect of the same.*

PETITION by Mr. Swinden, tenant in tail in possession of certain lands at the Burra taken under the Consolidation Act by the Government for railway purposes, praying that the compensation money now in Court—£647 5s. 4d.—to the credit of the Commissioner of Railways, might be paid to the petitioner, and that the petitioner should have his costs of the application.

Palmer, in support of the petition.—As a tenant in tail the petitioner has conveyed to the Commissioner of Railways.

Belt, for the Commissioner, appeared to submit to any decision the Court might think fit to make.

GWYNNE, P.J.—As the estate of the petitioner was such as would entitle him to sell the fee, there can be no objection to his having the funds, they being part of the inheritance. At any rate no difficulty can arise between the petitioner and the Government. If there are other parties to whom Mr. Swinden would be legally liable, he will have to account to them in priority of estate.

Order as prayed.

SUPREME COURT.	{ IN RE THE KAPUNDA UNITED TRADES- MEN'S PROSPECTING COMPANY. }	EQUITY.
----------------	--	---------

GWYNNE, PRIMARY JUDGE.]

[EQUITY.

14 APRIL, 1874.

IN THE MATTER OF THE COMPANIES ACTS, AND IN THE MATTER OF
THE KAPUNDA UNITED TRADESMEN'S PROSPECTING COMPANY,
LIMITED.

COMPANIES ACTS.—Dissolution.

Where from any cause, whether from a defect in its Articles of Association or otherwise, a Company is unable to pursue the objects for which it is formed, the Court has power on petition of parties interested to order its dissolution.

A provision in Articles of Association of a Company requiring persons representing the whole of its shares to be present at all of its General Meetings is in itself a ground for ordering the winding-up of the Company where some of the shareholders reside at the place where the operations of the Company are to be carried on, but at so great distance from the office of the Company as to render it difficult, if not practically impossible to secure their attendance at such General Meetings.

PETITION for an order to wind up the Kapunda United Tradesmen's Company.

The petition set out the due incorporation of the Company, and also the Memorandum and Articles of Association. The 32nd Article provided that no general meeting of the company should be held unless ten or more persons were present, representing not less than 2,000 shares.

Way, Q.C., in support of the petition.—The entire number of shares in the Company is only 2,000, and consequently the existence of the 32nd Article renders the whole Company practically unworkable, inasmuch as several of the shareholders are now resident in the Northern Territory. The Directors are unable to get a proper meeting or to make calls, and, in short, the whole affair is at a standstill. Some of the shares, too, have been forfeited, which of course increases the difficulty under which the Company labours. (GWYNNE, P.J.—The only question is whether

SUPREME COURT.	{	IN RE THE KAPUNDA UNITED TRADES- MEN'S PROSPECTING COMPANY.	}	EQUITY.
----------------	---	--	---	---------

I have any power to make an order under such circumstances.) Section 75 of the Companies Act of 1864 provides that the Court can make an order as asked when it thinks it is "just and equitable that the Company should be wound up."

GWYNNE, P.J.—I conceive, then, that the principle is that when a Company fails to pursue the objects for which it is formed the Court can order its dissolution. There may, however, still be some legal points raised. I think, however, I may make the order, and of course if found necessary there can be an appeal.

Order accordingly.

GWYNNE, J., WEARING, J.]

[COMMON LAW.

25 APRIL, 1874.

IN THE MATTER OF F. W. G. FISCHER, AN INSOLVENT.

The Supreme Court has power to issue a writ of Habeas Corpus, notwithstanding the fact that no rules have been made under Act 31 of 1855, clause 16.

A writ of Habeas Corpus can be granted by a Judge to bring up a prisoner imprisoned for an offence under the Insolvent Act of 1860, such imprisonment being not merely in the nature of a qualified execution but a punishment for a criminal offence.

Where the finding of the Commissioner of Insolvency, and the warrant under which the prisoner is detained, set forth as the grounds of such detention acts, some of which do and some do not constitute substantive offences, the warrant is altogether bad, and prisoner entitled to be discharged on Habeas of imprisonment upon final examination.

A warrant under the Insolvent Act, 1860, under which a prisoner was detained, and the finding of the Commissioner on which such warrant was founded, set forth, amongst other things, that the prisoner did "falsely pretend, &c.," but contained no allegation of his knowledge of the untruthfulness of such pretences or of any intention to defraud.

The warrant also showed, as a cause of imprisonment, other offences which were properly charged, and concluded with an order for imprisonment for a certain period as a punishment for the whole of the offences, unless the judgment debt should sooner be paid.

Held—That no offence of false pretences was disclosed by the warrant, and that one offence being improperly charged vitiated the whole of the warrant.

Semble—That section 125 of the Insolvent Act, 1860, does not contemplate a separate punishment for each offence.

WRIT of *habeas corpus*, calling upon the Sheriff and the Keeper of the Adelaide Gaol to produce the body of Frederick William George Fischer, an insolvent debtor, imprisoned under an order of the Commissioner of Insolvency.

The warrant recited that John Cherry and William Milne the younger, the assignees of the estate and effects of the insolvent,

were judgment creditors of the said insolvent for the sum therein mentioned. And, also, that it had been proved to the satisfaction of the Court that the said insolvent did at the time therein mentioned falsely pretend to certain creditors therein named that he did not then owe to any other creditor or creditors of him, the said insolvent, except themselves, any sum or sums of money whatever except for small weekly bills for household expenses; whereas the said insolvent did at the time he made such false representation owe large sums of money to other creditors, to wit, &c., by means of which said false pretences the said insolvent obtained the forbearance of the debt then due by him to the said first-mentioned creditors. And also that he did at the time therein mentioned falsely pretend and represent to certain creditors therein named that the total amount of his then debts was about £40, whereas such debts then amounted to upwards of £400, by means of which false pretences the said insolvent obtained the forbearance, &c. And, also, that the said insolvent did contract debts with, &c., to the amount of £104 5s. by means of false pretences, to wit, that he the said insolvent did not owe to other creditors money exceeding about £40, whereas at the time &c., he was indebted to other creditors in an amount exceeding £400. And, also, that the said insolvent did, within two months next preceding the filing of the petition for the adjudication of insolvency, fraudulently in contemplation of insolvency, and not under any pressure from any of his creditors, with intent to diminish the sum to be divided amongst his creditors, and to give an undue preference to some of his creditors, pay the following creditors wholly or in part, to wit, &c.

The warrant also disclosed other offences about which there was no question, and required and authorized the messenger to lodge and the keeper to receive and detain the prisoner in the Adelaide Gaol for the term therein mentioned, unless the said insolvent should sooner satisfy the assignee's debt.

Ingleby, in support of the warrant.—The Court has no power

to issue a writ of *habeas corpus*. The same point was taken in

Exparte Sellar, 1 S.A.L.R., 1, 32,

but not decided, as the Court suggested that the point should be waived *pro tem*. The ground of the objection was that by the Supreme Court Act, 31 of 1855-6, section 16, the Judges were bound to make rules for the governance of the practice of the Court, and until that was done in reference to the writ of *habeas corpus* there were no means whatever of issuing such writ.

GWYNNE, J.—I always understood that at the foundation of the colony all such English laws as were applicable became part of the Constitution of the province; but if the objection were good, the great prerogative writ in question is not available here, and a man might be illegally imprisoned without any means of redress.

Stow, Q.C.—The writ is a Common Law one.

GWYNNE, J.—The Court uphold the writ.

Stow, Q.C., then moved that the return to the writ be filed and read.

The return having been read,

Stow, Q.C., moved that the prisoner be discharged.

Ingleby.—I move that the writ be quashed. There is no power under the Statute for the issuing of a *habeas corpus* where the prisoner is detained for debt, and that the insolvent is so detained is clear from the wording of the warrant, which is to take effect unless the insolvent pay the assignees' debt. (GWYNNE, J.—The gravamen of the charge is that credit has been obtained by false pretences, and the finding of the Court below refers to that as the cause of insolvent's imprisonment, providing, however, a collateral termination of the punishment consequent on a certain

act. Had it been goods or chattels instead of credit which had been fraudulently obtained, of course the remedy would have been on the criminal side of the Court.) Imprisonment under the Insolvent Act is analagous to imprisonment for debt under the County Courts Act in England, and it has been held in

Exparte Dakins, 1 Jur., N.S., 378,

that a commitment from a County Court for a debt contracted by fraud is simply a qualified execution, inasmuch as payment of the debt would secure a discharge. In the case before the Court the insolvent is clearly imprisoned under a civil process, and therefore *habeas corpus* will not lie. That writ, originally under the Statute 31 of Charles II., can only be taken advantage of in criminal or *quasi* criminal matters; but jurisdiction in respect of it has been extended by the Act 56 of George III. But the writ, under any circumstances, is only intended to be resorted to where no more facile remedy has been provided. The insolvent has the benefit of such simpler course, and should have proceeded either by an application to the Court that issued the warrant or by appeal to the Supreme Court—

Insolvent Act, 1860, clauses 14, 15, 16.

By the last-mentioned clause also the Supreme Court could do such justice between the parties as cannot be done under a writ of *habeas*. (GWYNNE, J.—The Legislature has given an immense power to one man by the Insolvent Act; and it is hardly conceivable that the Commissioner should be able to inflict a term of imprisonment for three years without the person imprisoned having the benefit of a remedy by *habeas corpus*.) (WEARING, J.—By clause 136 of the Insolvent Act it is clear that release from imprisonment does not follow as a matter of course after the satisfaction of the debt.) The warrant under which the insolvent is in goal distinctly gives him that means of obtaining his discharge.

Stow, Q.C.—There is nothing in the Act to justify the framing of the warrant, as it appears in the schedule of the Act.

GWYNNE, J.—It will not be necessary to deal separately with each of the charges under which insolvent has been convicted. If one were proved in favour of the prisoner, the whole would be held to fail so far as the release of the prisoner is concerned.

Stow, Q.C.—The first ground I will take is that the warrant under which the insolvent has been imprisoned is not justified by law. The return shows the warrant to be under the hand of Mr. H. E. Downer, Commissioner of Insolvency; but the Act requires (clause 25) that it should be the warrant of the Court. The return also places the justification of the detention entirely on the warrant. Again, all acts of the Court of Insolvency are, by clause 9 of the Act, provided to be under the seal of the Court; but from the return it appears the seal of the warrant is simply Mr. Downer's private seal. The warrant, therefore, according to the return, is merely a warrant of Mr. H. E. Downer and under his seal. (*Ingleby*.—As a matter of fact, the warrant is under the seal of the Court, and if the return does not specify that I would apply to amend.) There can be no amendment of a document filed. The second point I submit is that there is a substantive punishment for each offence under the Insolvent Act, and there cannot be a general sentence for several offences. The practice as to that is the same as in criminal matters. Supposing a man has committed forgery and manslaughter, it is clear he would not receive one heavy punishment to cover both crimes. (GWYNNE, J. —The point arose in the great O'Connell's case. There the charges were numerous. O'Connell moved an arrest as to one of them and succeeded, and it was pointed out that as the sentence was intended to cover all the crimes, and one had been found unsupportable, the prisoner could not suffer for right.) The very wording of clause 125 shows that separate sentences are contemplated, as otherwise the words "in the whole" in the clause are nugatory; but if they were not there, an insolvent could be punished for three years for every offence, which was never

intended. A glance at the return will show that the insolvent has been sentenced in respect of more than one charge. (GWYNNE, J.—It appears to me that the charge of false pretences, as set out in the return, might arise from the different ideas held by different people as to what is a large debt. Even if the fact could be shown that a false pretence had been made, it would have to be proved that it was made knowingly and designedly. Any man might also make a mistake with regard to the amount of his liabilities, and in any case the expression “small” is only a relative one.) The Court has anticipated my argument on that point. The statement of the grounds of the conviction is exceedingly vague. It would be easy to understand, in addition to what has been said by the Court on the subject, that a man might have had heavy disputed debts which he would not reckon as properly part of his liabilities, and further debts might have been incurred by his agents without his knowledge.

GWYNNE, J.—There can be no crime unless it can be shown that it has been contemplated by the mind of the criminal. It seems to me, that the argument on that point is fatal to the assignees.

Ingleby.—I see the force of the contention if the offences specified in clause 135 of the Insolvent Act be taken as criminal offences, but they are not; and, therefore, the criminal code is not in any way applicable to them. With reference to the objection that there cannot be a cumulative punishment for several offences, it is clear there is a distinction intended to be drawn between a person convicted under the Insolvent Act and a common criminal, inasmuch as the payment of the debt is to operate as a release to the insolvent from all punishment. In insolvency, too, all the branches of a case are so intimately connected that the Commissioner is bound to look at them as a whole, and decide accordingly. The awarding of the certificate is affected by the collective aspect of the case. On every consideration the imprisonment is to be viewed as an execution under a limited *ex. sa.*, and therefore, the Judge had no power to issue the writ of *habeas*. As to the question of the warrant being under the seal of

the Court, everything will be presumed to have been done that should have been done, and the letters "L.S." refer not to the private seal of the Commissioner, but to the official seal of the Court. As to the payment of the debt not securing release, as appears by clause 136 of the Act, the Commissioner can always review his judgment at the suit of the assignees.

GWYNNE, J.—It appears to me simply to be a question of whether the offence for which the insolvent is imprisoned is to be regarded as a civil or a criminal one. The wording of clause 125 certainly rather mixes the point. But I think, at any rate, the fact of false pretences was not properly found. That being so, there are several offences for which a cumulative sentence has been awarded, and of such offences, one was now decided not to have been chargeable to the prisoner. Therefore, he is, as to that offence, being unjustly imprisoned, and consequently he is entitled to a discharge from the whole sentence.

J. W. Downer followed on same side.—The means by which the insolvent can get his discharge qualifies the language of clause 125, the words of which in themselves seem to indicate that the offence is to be looked upon as of a criminal nature.

Stow, Q.C.—The Court cannot go behind the writ. The case cited, *re Dakin*, is a clear authority that a *habeas corpus* may issue in a civil matter, and, therefore, the other side can only be arguing as to the form of the writ.

J. W. Downer.—With regard to the form of the warrant, if the fact of the prisoner being in gaol for debt be admitted; then the strictness of construction observed in criminal matters will not be adhered to by the Court. There is no difference between a committal for debt under the English County Courts Act and under the local Insolvent Statute. The only distinction is that the last-mentioned Act specifically uses the word "offence," while by the English Statute it is only implied. In *Dakin's* case the committal was for fraud, because the express word is not used.

SUPREME COURT.

IN RE F. W. G. FISCHER.

COMMON LAW.

The effect of the order is really not to inflict punishment but to prevent the insolvent obtaining his release under the Insolvent Act, for were it not for that Act a man might under a *ca. sa.* be imprisoned for life if he had not the means of payment. As to the facts, the Court below having judged the insolvent guilty of false pretences conveys the necessary implication that after a due consideration of the evidence it found the charge substantiated.

Stow, Q.C., in reply.—Assuming everything advanced on the other side, the case for the prisoner remains unanswered. Allowing that the insolvent is only imprisoned as on a limited *ca. sa.*, it only amounts to showing that a rule would have been the proper procedure, instead of the writ of *habeas*. But the question of form is not before the Court. There must be a power of impugning by *habeas corpus* the committal to gaol from any inferior Court.

GWYNNE, J.—Is it desired to amend the return?

Ingleby.—I would wish to do so, as far as the ambiguity with reference to the seal is concerned.

Stow, Q.C.—I will then abandon that branch of the case.

GWYNNE, J., delivered judgment as follows:—The insolvent has been imprisoned under the 125th clause of the Insolvent Act, 1860, for false pretences, and the warrant by virtue of which he is detained in custody has been drawn up in the form given in Schedule W of the Act. Neither the finding of the learned Commissioner, however, nor the warrant, alleges that the insolvent had wilfully or designedly falsely pretended, or that he knew that the representations he made were false. Nor are the exceptions negatived. In point of law, therefore, the Commissioner did not show that the insolvent was guilty of the charge for which he was imprisoned. Further, the incarceration of the prisoner is illegal by reason of the informality of the warrant of commitment. The contention on the part of the assignees is that, on the authority of *re Dakins*, the insolvent is not imprisoned for a criminal offence,

but is only in gaol under a limited execution. The wording of the clause with reference to a release on payment of the debts certainly rather mixes the question, making it appear partly an imprisonment for debt and partly for committing the offence; but in my mind, the idea that the punishment is for the criminality of the offence preponderates. I am of opinion, therefore, that the Court has no jurisdiction. Then, it appears the prisoner is in gaol for an offence of which he has not been properly found guilty. It is to be regretted that the exigencies of the case demand its immediate settlement, but, in my opinion, the prisoner should be discharged from custody.

WEARING, J.—I concur. I had some doubts as to whether the offence is a limited execution or a crime, but I think, it being a question affecting the liberty of the subject, I am bound to decide the main issue without delay. I agree with my learned colleague that we have jurisdiction, and having decided that, I have no doubt that the precision which ought to have been observed in such a case has not been exercised in drawing the warrant. I think the prisoner should be discharged.

Prisoner discharged.

SUPREME COURT. { WINN'S GOLD MINING COMPANY, { COMMON LAW.
 LIMITED, v. WYLD.

HANSON, C.J., WEARING, J.]

[COMMON LAW.

28 MAY, 1874.

WINN'S GOLD MINING COMPANY (NORTHERN TERRITORY), LIMITED,
 v. WYLD.

*COMPANIES ACT, 1864.—Increase of Capital—Notice—Application
 —Allotment call.*

A person who has applied to a Company for shares, but not paid any allotment call, though he may not be entitled to the full benefit of membership, is liable for calls.

Section 33 of the Companies Act of 1864, requiring notice of increase of capital to be given to the Registrar of Companies within fifteen days from the passing of the resolution authorizing increase, is merely directory, and the giving such notice is not a condition precedent to the bringing an action for calls subsequently made.

On appeal from a Local Court, whether of full or limited jurisdiction, the ruling of the Special Magistrate need not be obtained in writing, where the superior Court can collect from the Magistrate's notes the ground of the decision on the points of law raised at the trial.

RULE *nisi*, calling upon the plaintiff to show cause why a new trial should not be granted, or the verdict entered for the defendant, on the grounds—first, that the register of shareholders of the plaintiff's Company did not comply with the provisions of the Companies Act, 1864, and was inadmissible in evidence, inasmuch as the amount paid, or agreed to be considered as paid, on the defendant's shares did not appear therein; second, that to entitle the Company to sue for calls it was necessary that notice of the increase of capital and number of members beyond what had been originally registered should have been given to the Registrar of Companies; and, third, that although the resolution of the Company was, "That the Directors be authorized to issue 5,000 new shares," and the evidence showed that a much smaller number, 3,581, were applied for and issued, yet the defendant was compelled to take and pay for the shares applied for by him.

The action was tried in the Local Court, when a verdict was entered for the plaintiffs.

SUPREME COURT. { WINN'S GOLD MINING COMPANY, { COMMON LAW.
LIMITED, v. WYLD.

Nicholson now moved that the rule be made absolute.

Ingleby showed cause.—The ruling of the Special Magistrate has not been obtained in writing, which is a condition precedent to the hearing of all such appeals—

Roberts v. Heggie, 1 S.A.L.R., 72.

Janeway v. Snewin, 3 S.A.L.R., 74.

(HANSON, C.J.—I imagine that the Court cannot look to the affidavit as informing them of the proceedings. They must look to the Special Magistrate to do that.)

Nicholson.—The Clerk of the Local Court, on receiving notice of appeal, sends up the Magistrate's notes to the Supreme Court, and such notes contain everything referred to in the affidavit. (HANSON, C.J.—No reference whatever is made in the affidavit to the Magistrate's notes.) (*Stow, Q.C.*, as *amicus curiæ*, suggested that when the appeal did not arise out of a jury case the notice of such appeal brought everything before the superior Court.)

Ingleby.—The case was tried not before the Special Magistrate alone, but at a Court of full jurisdiction, and the ruling should have been brought before the superior Court in writing. (WEARING, J.—What is objected to in the cases cited by *Mr. Ingleby* is that statements of counsel of what took place at the trial are inadmissible and unfair as against the Magistrate's ruling.) (HANSON, C.J.—I think that when the Court can collect from the Magistrate's notes what were the grounds of the decision on the points of law raised that is sufficient.) I will, then, address myself to the question arising out of the order. First, with reference to the defendant not being a shareholder of the Company, it will be remembered that he applied to be so, that the shares were allotted to him, that he was entered in the register of shareholders; and further, that he, by a letter to the Secretary of the Company, in writing admitted his liability. Under Section 22 of the Act of 1864 a member of a Company is defined as *prima facie* any person whose name appears on the register. There was, therefore, a clear agreement to become a member of the Company,

SUPREME COURT. } WINN'S GOLD MINING COMPANY, }
 LIMITED, v. WYLD. } COMMON LAW.

and the defendant has been recognized as such. (WEARING, J.—Does the Act set forth any form as to how the register of shareholders is to be made out?) There is no specific form provided, but Section 24 indicates what are the requirements in order to constitute a valid register of members. But there is a distinction between a person's name being on the register as a fact under Section 22, and the register being so made up as to be admissible in evidence under Section 24. In the matter now before the Court, it will have to be assumed that the register is correct in every other respect but the one referred to in the order *nisi*. (HANSON, C.J.—I conceive that it would be absurd to say because there is some trifling omission in the register of shareholders of a Company it would thereby be rendered altogether valueless.) Apart from that, Section 24 only applies to cases in which it is proposed to make the register evidence. But as a fact, the defendant in the case before the Court had no right to appear on the register at all, inasmuch as he had not paid the allotment call, and, therefore, could not have been admitted to the full rights of membership in the Company. The plaintiffs relied on the defendant's agreement to become a member of the Company. But in any event the Section 24 of the Act is merely directory. The case of

Bain v. The Whitehaven and Furness Junction Railway Company, 3 H.L. Cas., 1,

relied on by the defendant, was an action brought under a special Statute. There Lord BROUGHAM certainly expressed the opinion that each share held by the various members of the Company should be specifically mentioned; but when that authority was cited before Mr. Justice BLACKBURN in the

East Gloucestershire Railway Company v. Bartholomew,
 L.R., 3 Ex., 15,

that learned Judge held that no specific entries in the register were necessary. With regard to the question as to whether the

SUPREME COURT. {	WINN'S GOLD MINING COMPANY, LIMITED, v. WYLD.	} COMMON LAW.
------------------	--	---------------

the other side are all referred to and distinguished in *Roscoe*, 1049. (HANSON, C.J.—The main question is whether there has been evidence given at the trial on which the Magistrate might have decided that the defendant was liable irrespective of the register. To prove that, the application for shares and the letter admitting the liability were put in.) But *de hors* the register, there could be no evidence of the defendant being a member of the Company. In the case

Bain v. Whitehaven and Furness Junction Railway Company

(*ante*), which is a late decision, the learned Judge pointed out the great power given to Companies of making evidence for themselves, and the necessity which, therefore, arises for holding that the law by virtue of which such great power is exercised is not merely directory. The importance of accuracy will be further seen when it is remembered that one of the great objects of such record is to secure some protection and guide for the creditors of the Company. With reference to the notice of increase of capital and members, there is nothing in the Magistrate's notes to show that any such notice had been given, and it is admitted that it had not been done till after action brought. Then, although the neglect to give the notice is punishable with a fine, yet that does not give a right to sue before the requisition has been complied with, as a Company only exists on the basis on which it is registered. Supposing the defendant had wanted to sell his shares, he would have been legally unable to do so, as they could have no existence prior to registration. The true test as to whether a person is liable under an agreement to take shares is, whether specific performance of the agreement could be enforced—

Buckley on Joint Stock Companies ;

and clearly the plaintiff's Company were in a position to have withdrawn the additional issue of shares if they had thought fit. (WEARING, J.—Could the defendant have got the application call back again?) I think so, the shares not being registered. Even

SUPREME COURT. {	WINN'S GOLD MINING COMPANY, LIMITED, v. WYLD.	} COMMON LAW.
------------------	--	---------------

the change in the name of a Company could not take effect until after registration—

Roscoe.

On the point as to part only of the new issue of shares having been taken up, I will simply cite the case of

Johnson v. Goslett, 27 L.J., N.S., C.P., 122.

HANSON, C.J.—In my opinion, the order must be discharged. I have no doubt whatever that the defendant's application for shares constituted an agreement under which he was liable. Whether he would be entitled to the benefits of membership until after payment of allotment call is another question. Under Section 27 of the Act, the defendant appears to me clearly to be a member of the Company, for his letter of application is a distinct authority to put him upon the register of shareholders. The register, therefore, is conclusive evidence against him. The question of only a portion of the shares having been applied for is clearly one of fact. As to the notice to the Registrar of increase in the capital and number of members, I am of opinion such notice was not a condition precedent to the bringing of an action, but that the clause is merely a directory one. The Court will not interfere if they think that substantial justice has been done, and, allowing that the objection referred to is valid, the plaintiff would only have to remedy the defect and then bring a fresh action, so that the question is only one of saving delay and expense.

WEARING, J.—I concur. It certainly has not been shown that the alleged insufficiencies of the register of shareholders were of such a nature as to affect the defendant's liability. As to the notice to the Registrar, I think it cannot be taken as imperative, but simply as directory. With regard to the remaining point of the number of shares taken up under the new issue, I am of opinion that the question is one of proportion, and, consequently, one of fact.

Rule discharged with costs.

SUPREME COURT.

REGINA v. TOWNSEND.

NISI PRIUS.

WEARING, J. AND A JURY.]

[NISI PRIUS.

19 JUNE, 1874.

REGINA v. TOWNSEND.

Act No. 9 of 1859.—Murder—Concealment of Birth.

On an indictment for murder of an infant the fact that the child born alive must be strictly proved, and it is not sufficient to adduce circumstances which raise a presumption of violence.

An infant was found in a privy dead, with a piece of wood wedged in its mouth, but no evidence was adduced to show that the child had been born alive.

Held—That there was no evidence to go to the jury to support the charge of murder.

Under Act No. 9 of 1859 the mother alone is liable on an indictment for concealing the birth of a child.

INDICTMENT against the grandmother of an infant found dead for murder, and also for concealment of birth.

The facts, so far as the same are material to the issues involved, being as stated in the head-note.

J. W. Downer, for the prisoner, submitted that the indictment for murder had failed.

WEARING, J.—I think so. The books lay it down that in such cases it is necessary for the prosecution to prove that the child has been born alive in order to sustain a charge of murder. It is not sufficient to show an alternative; there will have to be distinct evidence on the point.

Andrews, Q.C. (Crown Solicitor).—The case should go to the jury. The evidence as to the piece of wood in the child's mouth raises a sufficient presumption to go to the jury that death has resulted from foul play. The question of *animus* also is one for the jury.

WEARING, J.—The presumption must be in favour of the prisoner, until disproved by the prosecution, that the child was born dead. The fundamental presumption, then, not having been

SUPREME COURT.

REGINA V. TOWNSEND.

NISI PRIUS.

rebutted by the Crown, the value of the evidence as to the piece of wood cannot be considered. The case can only proceed on the lesser charge of concealment of birth and disposition of the body.

J. W. Downer.—I ask that the prisoner be discharged. Under the Statute No. 9 of 1859, the mother only is liable to an indictment for concealing the birth of a child. The provision in the local Statute is based on the Imperial Act of 9 of Geo. IV. In England, however, it has been thought desirable to make other persons amenable for concealment of birth, and therefore an amending Statute of 24 and 25 Vict. has been passed. But the last-mentioned Act has not been enacted in the colony, and therefore the law here is in the same position as it was in England before the Act of 24 and 25 Vict. It was decided, however, before the Act of Vict., in the case of

Reg. v. Wright, 9 C. & P., 754

that the mother was the only person who could be indicted for the misdemeanour in question.

Crown Solicitor, in reply.—Under the local Act, No. 3 of 1859, sec. 7, all aiders and abettors of crime are amenable to the law.

WEARING, J.—Is No. 3 of 1859 analogous to an Imperial Statute?

Crown Solicitor.—Yes; an Act of 7 and 8 Geo. IV.

WEARING, J.—In that case the instance before the Court is on all fours with *Reg. v. Wright*.

Crown Solicitor.—The decision referred to was not arrived at after argument. It was simply a question raised incidentally. I would ask Your Honor to reserve the point.

SUPREME COURT.

REGINA v. TOWNSEND.

NISI PRIUS.

WEARING, J.—I am of opinion that the authority quoted is decisive. I am only here to follow the laws as framed by the Legislature; but I may say that it is highly desirable that the law in reference to concealment of birth should be placed in the same position here as in England. It is to be hoped that will be done. If the mother were an accessory—and on that I express no opinion—it is very unfortunate that the colonial law will not allow of the case against her being proceeded with.

Prisoner discharged.

SUPREME COURT. TOTHILL v. BURNETT AND ANOTHER. COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

2 JULY, 1874.

TOTHILL v. BURNETT AND ANOTHER.

LOCAL COURTS ACT, 1860.—Trover—Sale by bailiff under execution—Claim of third party—Security.

Section 144 of the Local Courts Act, 1860, provides that where any third person shall have any claim to or in respect of any goods or chattels taken in execution under the process of any Local Court or in respect of the proceeds or value thereof, such claim shall be made before the actual sale thereof if the returns of the specific goods be claimed, or if the claim be for the proceeds or value thereof, then before the amount received under the execution shall have been paid over or distributed; and thereupon it shall be lawful for the Clerk of the Court upon the application of the officer charged with the execution of such process to issue a summons.

Section 145 provides the security to be deposited by the claimant with the bailiff.

Under execution issued out of a Local Court against the goods of A the bailiff seized a horse, the property of B, which was then on A's premises. B claimed the horse before sale, but neither deposited security for the prosecution of his claim nor tendered the expense of keeping the horse.

The bailiff proceeded to sell without reference to B's claim.

Subsequently B obtained possession of the horse and refused to deliver it to the purchaser.

In trover by the purchaser against B,

Held—That the property in the horse passed by virtue of the sale, and the plaintiff was entitled to recover.

The counsel for the party at whose instance a case is reserved and whose client is unsuccessful in the Court below has the right to begin on the argument of the case.

SPECIAL case from the Adelaide Local Court.

The facts were as stated in the head-note.

The action was trover, and on the trial a verdict was entered for the plaintiff, subject to the opinion of the Supreme Court, on the question whether the property in the horse passed to the plaintiff by virtue of the sale to him.

SUPREME COURT. TOTHILL v. BURNETT AND ANOTHER. COMMON LAW.

Ingleby, for the defendant.—There is some doubt as to which counsel should first address the Court. I submit that I have that right, as the question of law has been reserved at my request; and, moreover, my client was the unsuccessful party in the Court below. (HANSON, C.J.—Yes.) The property does not belong to the plaintiff under the sale by the bailiff. It is clear that a Sheriff has no right to seize the goods of A, and sell them under an execution against the property of B—

Farrant v. ———, 3 Starkie, 130.

Then the question is how do the clauses 144, 145, and 146 of the Local Court Act of 1861, relating to interpleader summonses apply? (GWYNNE, J.—If the defendant did not tender the cost of keeping the horse, was not the bailiff justified in selling?) I submit not. The bailiff ought to have consulted the execution-creditor as to whether the property was to be retained or given up to the claimant. (HANSON, C.J.—Suppose the creditor replied that that was a question for the bailiff to decide?) Then the bailiff should propose to issue the interpleader. The clauses of the Act are for the protection of the bailiff, not of the execution creditor.

HANSON, C.J.—The bailiff seized the property and was bound to sell within a certain time. A mere claim was not sufficient to justify him in postponing such sale. The claimant should either have deposited security for the due prosecution of his claim or have paid the expense of keeping the horse pending the hearing of the interpleader summons. Failing that, all he would be entitled to on proving his right would be the surplus proceeds of the sale.

GWYNNE, J.—And the power of the bailiff to sell implies that property so sold would pass.

HANSON, C.J.—The Court holds that the property did pass by the sale. The question submitted will therefore be answered in the affirmative, with costs against the defendants.

SUPREME COURT.	{	MOORE AND ANOTHER V. DOLAHAN AND OTHERS.	}	COMMON LAW.
----------------	---	---	---	-------------

GWYNNE, P.J.]

[EQUITY.

JULY 7, 1874.

MOORE AND ANOTHER V. DOLAHAN AND OTHERS.

WILL.—Construction.

A testator by his will directed that certain property should at the expiration of an outstanding term be sold and the proceeds divided amongst three grandsons; the wife of testator in the meantime to receive the rent payable under the lease, and after her death the grandsons in equal shares. The testator directed his executors to divide his residuary personal estate "equally between his four grandchildren thereinbefore mentioned, his two daughters, and his wife."

As a matter of fact there were five grandchildren previously mentioned in the will.

Held—First—That the property under lease before referred to passed to the executors.

Second—That all the grandchildren shared in the residuary personality.

Third—That the residuary personality was to be divided amongst the beneficiaries per capita as tenants in common.

CASE stated under Division VI. of the Equity Act, for the opinion of the Court as to the proper construction of the will of Richard Dolahan, late of Peachey Belt, farmer, deceased.

The plaintiffs were the daughter and son-in-law of the testator, and the defendants the other persons interested under the will, and the executors.

The testator, by his will, dated May 20, 1873, directed that the northern moiety of his section, No. 22, County of Gawler, should be sold on the expiration of a lease to one Charles Tilley, and the proceeds divided equally between three grandsons, John, Michael, and James Dolahan; but the rents payable under the lease were to go to the testator's wife, if living, and in the event of her death were to be divided between the grandsons named. After certain specific bequests, the testator directed his executors "to divide

SUPREME COURT. {	MOORE AND ANOTHER v. DOLAHAN AND OTHERS.	{ COMMON LAW.
------------------	---	---------------

equally between his four grandchildren thereinbefore mentioned, his two daughters, and his wife," his residuary personal estate.

The opinion of the Court was asked for on the following points:—First, whether the northern moiety of Section 22, County of Gawler, passed under the will, to the executors, upon the trusts mentioned; secondly, who were entitled under the words "my four grandchildren hereinbefore named," to the residuary personal estate, as in fact the testator had previously mentioned in his said will all his grandchildren—five in number; thirdly, whether the said residuary estate was to be divided into as many parts as there were persons mentioned, or whether it was intended that it should be divided into three equal parts only, to go to the grandchildren as one class, the daughters as another, and the wife as a third; and, fourthly, whether, if the last mentioned were the true construction of the will, the grandchildren and daughters took their parts as joint tenants or tenants in common.

Barlow, for the plaintiff.—The first question arises on that part of the will which refers to the northern moiety of the testator's Section No. 22, Hundred of Grace, County of Gawler. It is clear there is no specific devise of that part of the estate. But it is submitted that there was an implied devise to the executors, inasmuch as a trust is imposed upon them in relation to the property in question, by the testator directing the rents arising from the land to be paid in a certain way. It is quite evident that the executors are to manage such rents. That supports the contention that there is an implied devise, more especially as the will contains a power to sell the land in question.—

Sugden on Powers, 118

Forbes v. Peacock, 11 Simon, 152, citing *Ward v. Devon*.

The next point is as to the division of the residuary personal estate. As to that, the Court will be asked to strike out the specific numeral "four," as having been inserted by mistake, and

SUPREME COURT.	{	MOORE AND ANOTHER v. DOLAHAN AND OTHERS.	}	COMMON LAW.
----------------	---	---	---	-------------

to allow the benefits of the bequest to all the grandchildren. It will be observed that the will contains nothing opposed to such a construction, and does not point to any distinction being made between the grandchildren—

Hawkins on Wills, 62

Wrightson v. Calvert, 1 Johns & H., 250

McKechnie v. Vaughan, L.R. 15 Eq., 289.

The only remaining question is whether the testator contemplated the division of his residuary personalty into three parts, or intended an equal division between his grandchildren, daughters, and wife, individually. The view which all parties have agreed to submit to the Court is, that the word “equally” is decisive as showing an intention to divide the property individually. In short “equally” governs the construction of the whole bequest—

Hawkins on Wills.

The devisees, also, will, it is contended, take as tenants in common.

Way, Q.C., for the infant beneficiaries supported the same, contention.

GWYNNE, P.J.—The only doubtful question is as to the division of the residuary personal estate.

Way, Q.C.—The authority referred to in “Hawkins on Wills” conclusively shows that the devisees will take *per capita*, not *per stirpes*.

Wigley, on behalf of the executors took the same view.

GWYNNE, P.J.—I am inclined to be guided by the construction contended for. I would like to know whether a formal judgment

SUPREME COURT. }	MOORE AND ANOTHER v. DOLAHAN AND OTHERS. }	COMMON LAW.
------------------	---	-------------

will be requisite in order to allow the executors to deal with the estate.

Way, Q.C.—I imagine there will be a formal declaration of the opinion of the Court.

- Declared* —1. *That the property in question passed to the executors.*
2. *That all the grandchildren were included in the bequest of the residuary personalty.*
3. *That the grandchildren took such residuary personalty per capita as tenants in common.*
-

SUPREME COURT.

TRANTER V. LORD.

COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

COMMON LAW.

30 JULY, 1874.

TRANTER V. LORD.

REAL PROPERTY ACT, 1861. — Ejectment — Agreement for Lease — Tenancy from year to year.

In ejectment by the registered proprietor of land under the Real Property Act, the defendant set up that he had entered into possession by virtue of a verbal agreement for a lease for ten years from the former registered proprietor, and that by virtue of such agreement he became tenant from year to year, and was entitled to six months' notice, expiring at the time of year when his tenancy began.

Held — following Manning v. Crossman — That the defendant showed no estate or interest in the land valid against the unencumbered certificate of the registered proprietor.

MOTION, pursuant to leave reserved, for a rule *nisi*, calling upon the plaintiffs to show cause why the verdict herein should not be set aside and a new trial granted on the ground of improper rejection of evidence.

The case was tried on the 14th July, when a memorandum of transfer was proposed to be put in as evidence with a view to showing that the plaintiffs claimed through one Henry Warren. The Chief Justice rejected the evidence, reserving leave to the defendant to move for a new trial on the ground that such rejection was improper.

The facts were as follows:—Henry Warren, the then registered proprietor of two sections of land, verbally agreed to grant the defendant a lease of the same for ten years, in consequence of which agreement the defendant entered and paid rent. Subsequently, Warren transferred to the plaintiffs, without reference to the defendant's tenancy, and the plaintiffs brought ejectment, putting in a clean certificate under the Real Property Act as conclusive evidence of their title.

F

Stow, Q.C., in support of the motion.—The question is one of great importance, and arises under the Real Property Act. The plaintiffs, relying on a certificate of title, sought to recover, in ejectment, from the defendant possession of certain land. The defendant proposed to show that he had an estate as lessee under a lease for less than three years, given by the person who had sold to the plaintiffs. The question was whether the transfer to the plaintiffs deprived the defendant of all his rights. I contend that the words of Section 39 are repealed by the subsequent clauses as to leases.

HANSON, C.J.—The defendant's term was not a lease for less than three years, but a tenancy from year to year created by an agreement for lease for ten years.

GWYNNE, J.—I fail to see how the defendant's case is distinguishable from the solemn judgment of this Court in the case of *Manning v. Crossman*. I think, also, that the judgment was a right one.

HANSON, C.J.—I have looked carefully into the matter, both in connection with the case now before the Court, and another somewhat similar one in which judgment has been reserved. It seems to me that clause 39 of the Act clearly excludes estates which might have priority over the certificate of title but for the Real Property statutes.

GWYNNE, J.—According to my view, there is no such thing as a title under the Act, unless it is on the Register-book. I conceive that to be in accordance with the great principle of the Act.

HANSON, C.J.—I think that the holder of a certificate of title would take the land free from everything which did not appear on the Register-book.

Stow, Q.C.—My point is that the provisions of the Act, as to registration, only applies to such estates as are capable of registration. There is nothing in the Act to show that the smaller estates are to be entirely destroyed. It is impossible, however,

SUPREME COURT.

TRANTER V. LORD.

COMMON LAW.

under the Act that they can be registered, and clause 48, by the words "which is required to be registered by the provisions of this Act," clearly recognizes leases for terms which do not require registration under the Act.

HANSON, C.J.—I see no reason to depart from the judgment of the Court in *Manning v. Crossman*. It no doubt appears by clause 48 of the Act that the Legislature contemplated the recognition of leases outside the Act; and if it had gone further, and in express language defined and admitted such smaller leases, the Court would be bound to accept the contention that the effect of Section 39 was repealed. In the absence of such express language, however, the Court is bound by the general tenor of the Act. I am of opinion that a rule should not be granted.

GWYNNE, J.—I concur. As to quoting any particular clause of the Act, I am of opinion that the general construction of the measure is so ambiguous that it may be made to prove anything. The clauses contradict each other. I, therefore, look to the great principle of the measure. If it were once admitted that unregistered leases could exist, all the rights connected with such leases would also have to be recognized. The term could be assigned, and a contract for purchase of it would be enforceable in Equity. The registration system of the Real Property Act, however, will not allow of the existence of such terms and their attendant rights. The two systems would clash.

WEARING, J.—I express my opinion with great diffidence. I agree that registration is the great principle of the Act, but looking at Sections 39 and 48, I confess that they appear to me to be contradictory. The latter seems, in my opinion, to admit of the construction that the Legislature intended to recognize lesser interests than those for three years. The Court has, however, decided otherwise in the case of *Manning v. Crossman*, and I am not, therefore, prepared to dissent from the judgment of my learned colleagues.

Rule refused.

SUPREME COURT.

IN RE J. T. H. WEST.

COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

30 AND 31 JULY, 1874.

IN RE J. T. H. WEST.

HABEAS CORPUS. — *Non-production of Warrant — Imperial Statute 6 and 7 Victoria—Local Acts No. 8 of 1851 and 1864 — Offence—Endorsement of Warrant.*

Habeas Corpus will be granted on affidavit that, on demand by prisoner, no warrant for his detention has been produced.

An endorsement of a criminal warrant in New South Wales by a South Australian Justice resident there, and made before the person to be arrested reaches South Australia, is not such an endorsement as is contemplated by Act No. 16 of 1864, and a prisoner detained in this Province on a warrant so endorsed is entitled to be discharged.

The indictable misdemeanour within the meaning of Section 1 of Act No 16 of 1864 need not be an indictable misdemeanour in this Province, but it is sufficient if it be so in the colony where such warrant issued.

THE affidavits in support of the motion set out that the prisoner, Dr. West, had been arrested at Wentworth, was brought into South Australia, and then detained at Gawler, instead of being brought to Adelaide in due course. That his counsel had been unable to obtain from the Police any explanation of such detention, and that the sergeant in charge at Gawler admitted that he had no warrant for detention of the prisoner, but detained him pursuant to a telegram from the Inspector of Police at Adelaide. The sergeant stated, however, that Mr. McClosky, a Tasmanian officer then in Adelaide, held a warrant.

J. W. Downer, in support of the motion.—It is only by virtue of a Statute, 6 and 7 Vict., and the Local Acts of 1851 and 1864, that any warrant for the apprehension of offenders in the adjoining colonies can be executed out of the colony from which it is issued. The Act of 6 and 7 Vict. provides that a Judge of the colony in which the offender is shall endorse the warrant, and thereby sufficient authority is given to the Police to arrest and take the accused before a Justice of the Peace, who is to take depositions; and if the evidence discloses an offence cognizable by

the law of that colony the Justice has power to order the prisoner to be carried back to his own colony for trial. The Local Statute 16 of 1864 is rather different in its provisions, as it gives power to arrest and take before a Justice of the Peace, but it is not very clear what the Justice has to do.

HANSON, C.J.—We are of opinion that the writ may be granted on the affidavits that Dr. West is detained without a warrant being produced for his detention.

Writ granted, returnable at 11 o'clock on Friday.

The return to the writ showed a warrant of a Tasmanian Justice of the Peace for that which was according to the law of that colony, but not according to the law of South Australia, an indictable misdemeanour. And further, that the prisoner had been arrested in New South Wales and brought into South Australia by virtue of the endorsement of the warrant in New South Wales by a South Australian Justice of the Peace resident there and made prior to the prisoner reaching South Australia.

J. W. Downer now moved that the prisoner be discharged.—The warrant is not properly endorsed within the meaning of the Act, being endorsed in New South Wales prior to the prisoner reaching this Province. Besides, the depositions do not disclose an offence which constitutes an indictable misdemeanour within this Province.

Way, Q.C., in reply, submitted that the Court would advance the remedy.

HANSON, C.J.—It is sufficient that the warrant discloses an offence which constitutes an indictable misdemeanour in the colony where the warrant was issued, but the warrant is improperly endorsed, the Magistrate having no jurisdiction at the time; and the prisoner must be discharged on that ground.

Prisoner discharged.

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

3 JULY AND 13 AUGUST, 1874.

BUCKETT V. KNOBBE.

REAL PROPERTY ACT, 1861.—Ejectment—Lease for two years—Registration.

A, the registered proprietor of certain land under the provisions of the Real Property Act, 1861, by a document in the form prescribed by the Act, duly executed but not registered, purported to let the same to B for two years, with a right of purchase.

B subsequently became insolvent, but for some time after his insolvency continued in possession of the land, and paid rent to A.

In ejectment by A against B.

Held—Per WEARING, J.—That the provisions of the Real Property Act, 1861, regulating the making and registration of leases, do not apply to leases for less than three years, and such leases can therefore be created as at Common Law, orally or by writing, and without registration.

Per GWYNNE, J.—Following Manning v. Crossman—That a lease for less than three years of land under the provisions of the above Act cannot be registered, and cannot therefore be created, registration being essential to every dealing with any interest in land under such Act.

Per HANSON, C.J.—That a written demise for less than three years of land under the above Act is invalid unless in the form prescribed by the Act, and registered; but entry and payment of rent under such void demise creates as at Common Law a tenancy from year to year.

That an oral demise of land under the above Act for less than three years is good, but the term thereby created is not assignable.

RULE *nisi*, calling upon the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered, on the grounds that the plaintiff had failed to prove his title; that such title was either in the defendant or a third party; that the assignment of a lease not being under seal did not operate to pass any estate; and that the quarterly payment of rent created a yearly tenancy independently of the lease, but determinable by effluxion of time at the expiration of the period for which such lease was granted.

The action was ejectment.

SUPREME COURT.

BUCKETT v. KNOBBE.

COMMON LAW.

The land was under the provisions of the Real Property Act of 1861, and at the trial an unregistered document in the form prescribed by the Act, signed by the registered proprietor (the plaintiff) was put in, which at Common Law would have constituted a lease to the defendant for two years. Between the date of this document and the commencement of the action the defendant had become insolvent, but had, subsequently to his insolvency, continued to pay rent to the lessor.

Stow, Q.C., now moved that the rule be made absolute.

Way, Q.C., showed cause.—On the substantial merits of the case, the plaintiff has all in his favour, the defendant being, in fact, a mere trespasser. There is no doubt that at Common Law the defendant's lease would operate, and that on his becoming insolvent his assignees would have a right to elect whether they would take the lease or not. The assignees have adopted the lease in question, and disposed of it to Mr. Carvosso. The assignment, however, would not be binding at Common Law, inasmuch as it was not by deed. But the defendant has, at any rate, lost his interest. Then the Real Property Act comes in, and both on the terms of that Act, and on the cases decided by the Supreme Court under it, the plaintiff has a right to succeed. The case of

Manning v. Crossman, 5 S.A.L.R., 130,

is exactly in point, the only distinction being that there the executory agreement preceded the registered title under the Act, and that the tenancy had been created before the transfer under the Act of the property to a third party. The registered holder then leased back again, according to the provisions of the Act, to Mr. Manning, and the latter recognised the pre-existing unregistered lease. There it was not simply a question of the tenancy becoming void on the ground of non-registration, but the unregistered lease had actually been subsequently recognised by the receipt of rent under it after the plaintiff's title accrued. It was in that case clearly held that where the certificate of title had been put in

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

evidence, nothing could contradict it but a duly registered instrument. That is also clear from the language of the Act and the other decisions under it. The Court has frequently held that no interest can be created in lands under the Act except by registration. The principle goes so far that an heir-at-law and assignees in insolvency do not take property under the Act, but only a right to be registered as owners. The same applies to devisees under a will. In

Kelly v. Doody, 5 S.A.L.R., 132,

the Court expressly held that under a deed of assignment the property does not pass to the trustees, because there is no provision for registering the trustees as holders of land under the Act, and to convey the property to them a transfer in form and manner provided by the Act is necessary. The whole tenor of the authorities, therefore, has been to make the Register-book the repository of all rights in land under the Act. The Statute is, in fact, a code, and persons taking the benefit of its simplicity have to forego the recognition of many equitable and other rights cognizable under the old law. The spirit of the Act is found in the English Shipping Law. Referring to the judicial decisions on the subject, the Chief Justice, in the case of

Lange v. Ruwoldt, 6 S.A.L.R., 79,

observed that the benefit of the Act would be lost if anything but registration and the Register-book were relied upon. By Section 39 of the Act, no instrument is effectual to pass any estate or interest unless registered in the manner prescribed by the Act. Then, Section 40 provides that the registered holder holds the property subject only to such encumbrances as appear on the Register-book. In *Lange v. Ruwoldt* the Primary Judge said, in citing Section 33 of the Act, which makes the certificate of title conclusive evidence, that he regarded the certificate as speaking from the moment it was issued and continuing to do so until affected by something appearing in the Register-book. The transactions appearing in the registry, therefore, are the only ones

which the Court can recognise. But *Lange v. Ruwoldt* also decided that the forms set forth in the Schedule to the Act are binding, and to be strictly followed in all dealings with land. In that case, too, the Primary Judge called attention to the fact that the repealing clause of the Act expressly repeals all law relating to real property inconsistent with it. That will dispose of the question of whether the assignment of the lease should have been by deed. If the defendant's lease were held good, the effect would be that inasmuch as assignees in insolvency can only obtain possession of land under the Act by registration as provided by clause 87, and inasmuch as a lease for less than three years cannot be registered under the Act, an insolvent would be able to keep possession of and enjoy such a lease as the one before the Court. Again, Section 39 enacts that no grant, deed, contract, or other writing shall be valid unless registered in the manner provided. How, then, would a purchaser from the assignees in insolvency, supposing they were themselves registered, obtain a title to his interest? It is evident that the whole object of the Sections from 38 to 42 is intended to prevent the creation and existence of unregistered instruments. So strong, in fact, is the language of the clauses mentioned, that under them a landlord might turn out a tenant holding directly from him under an unregistered lease or a tenancy from year to year. If not intended to be so construed, the language of the Statute would not have been left so wide and general. The Court has not in the past shrunk from giving full effect to that language, and that is the only way in which to make the measure a perfect one. Then, if defects are found, it is always easy to remedy them by an amending Act. The position will be more clearly seen by taking the case of an heir-at-law, who clearly cannot recover as against a person who has a prior registered estate. All the heir has is a right. (GWYNNE, J.—Not a right altogether, because the Lands Titles Commissioners form their own judgment as to the evidence of his right.) It would further be highly inconvenient to recognise a lease such as that under which the defendant claims. The effect would be practically to create an *imperium in imperio*. Then, again, assuming the defendant to be right, to whom is the plaintiff to look for rent?

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

The insolvent would not be liable, having been discharged from liability by virtue of his certificate, and the assignees of Mr. Carvosso could not be called on to pay, inasmuch as they held only an interest under an unregistered instrument. In reference to the doctrine of estoppel, on which the defendant relied, the case of *Kelly v. Doody* is an abundant answer to that. In the face of the decision in *Manning v. Crossman*, therefore, and also of the fact of all laws inconsistent with the Real Property Act having been for the purposes of the Act repealed, it would be simply against both law and precedent to hold that the plaintiff has no right to recover.

Stow, Q.C., in support of the rule.—The question of merits is not before the Court, it only having to deal with the dry point of law, which is, briefly, whether a person can make a lease for less than three years under the Real Property Act, and whether a tenant under such a lease can be ejected. (GWYNNE, J.—As to the merits, on the justice of the case I think the Court will be with you.) I think so. I will first look at the case irrespective of the Statute, and then consider it in the light of the Real Property Act and the well-known canons for the construction of Statutes. First, then, without the Act unquestionably the plaintiff would have no *locus standi* whatever. The defendant would be entitled to a verdict by right of possession, and the plaintiff would be put on his proof of a better title. Then as to the Act. It is clear that the estate vested in the defendant is exempt from the provisions of the Statute, and having once been created is to be dealt with under the old law. The only exception would arise in the case of a person taking a transfer of land on a certificate showing no encumbrance. Such third party would certainly not be bound by the unregistered lease. The defendant's tenancy is one which might arise by construction of law without any written document, and, therefore, the provision of the Act directing that no instrument should be effectual unless registered does not apply. (GWYNNE, J.—Yes: you might make such a lease, irrespective of the Statute of Frauds.) (HANSON, C.J.—But it would only be assignable by deed.) The insolvency of the defendant has nothing

to do with the question, and, therefore, it all comes back to the cardinal point as to whether the defendant's tenancy is a valid one. It will be remembered, too, that the plaintiff received rent from the defendant after the insolvency. (*Way, Q.C.*—But before the assignees elected to take the lease.) That is immaterial. The receipt of the rent by the plaintiff would operate to create a tenancy between himself and the defendant. (*HANSON, C.J.*—No doubt that would be so irrespective of the Real Property Act.) Sections 47 and 48 of the Act are the two which most bear on the question in dispute. By Section 47 directions are given as to the leasing of lands under the Act “for any term exceeding three years.” That clearly excludes such leases as the one under which the defendant claims. It cannot be conceived, in the absence of express words, that, by implication alone, the Legislature intended to say that there should be no tenancy created except for a term exceeding three years. The shorter terms—for one, two, and three years—are by far the most general, especially in large towns. The simple fact of the Legislature not having provided a means for regulating the lesser tenancies cannot be said to prevent the existence of such tenancies. By the following clause, too, No. 48, the intention to recognise short terms is quite evident. There the language is “whenever any lease or demise, *which is required to be registered* by the provisions of this Act,” &c. That conveys the clearest implication that other leases exist which do *not* require to be registered, and they, therefore, are exempted from the provisions of the Act. Then, what is the effect of the interpretation clause of the Act? That section only affects to influence instruments “purporting to be made or executed” under the Statute, and also when such specified interpretations are “not inconsistent with the context and subject-matter.” But if the lease in question is expressly excepted from the operation of the Act and cannot be registered, Section 2 will not affect it. Everything, therefore, turns on the point as to whether the lease is an instrument under the Act. Then, as to Section 40, that only refers to what the certificate of title would prove as to any other estate by title paramount. (*HANSON, C.J.*—Many of the points being taken were not raised in *Manning v. Crossman*.) Yes; and that case did not

go to the extent which would appear by the volume of the Law Reports. There the plaintiff, after giving the lease to the defendant, transferred the land to Magarey, who re-leased it to him. I thereupon contended that the plaintiff was estopped from denying the defendant's title, but the Court were of a contrary opinion. All that the case decided, however, was that the transfer by Manning to Magarey had avoided the defendant's lease. It was not said that no such lease had been created. Then, Section 33 of the Act is not inconsistent with the existence of the defendant's interest, because if it were, the same argument would apply to a lease for more than three years. The language of Section 39, also, "no instrument shall be effectual to pass any estate or interest," &c., could only apply to instruments recognisable by the Act; it did not operate to prevent the making of short leases. The provision, moreover, is general, and precedes the clauses 47 and 48, which latter being the last expression of the will of the Legislature will prevail. It is, also, a well-known canon of construction that general words of an Act are always subservient to particular provisions. Statutes, too, are to be construed so as to support, not to frustrate, the intention of the Legislature. The clear intention of the measure in question is to provide regulations with respect to lands under it; but it does not ignore or render inoperative interests not specifically dealt with, but recognised by law. As to the authorities cited, it is certain that *Manning v. Crossman* did not go to the extent of deciding that there cannot be a lease recognised by the Act for less than three years. *Kelly v. Doody* only established that under a deed made in pursuance of an Act prior to the Real Property Act, land under the provisions of the latter Statute did not pass. With regard to all the authorities cited, also, it is to be recollected that any general observations falling from the Judges must be taken in connection with special circumstances of the case then before them. In *Lange v. Ruwoldt* the point was whether any instrument, not in the form prescribed by the Act, was effectual in passing the estate. Attention, however, was not then directed to the exceptions to which reference was made in the case before the Court. (HANSON, C.J.—I quite see that the cases referred to are only authorities

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

for the particular points they decide.) Then, with regard to the repealing clause of the Real Property Act All that it enacts is that all laws inconsistent with the provisions of that Statute are thereby repealed, and that would seem to have been inserted by some layman, for it would all be implied as a matter of course. (GWYNNE, J.—It is a species of rhetorical flourish.) Exactly; but it cannot be held to extend to all the law on the subject of real estate, whether affecting the Act in question or not. As to the points as to the estate of the assignees, and the power of an insolvent to hold an unregistered lease even after an insolvency, both points beg the main question at issue. With reference to the inconvenience which would be caused by upholding the defendant's contention, it can only be said that, on the broad principle, the consequences would be far more disastrous if the Court held that no lease for less than three years could be recognised. (GWYNNE, J.—The defendant's lease contained a right of purchase. If therefore the Court held the lease good, they would also have to confirm the defendant's equitable right to purchase the property. That would be recognising an equity: which, according to *Lange v. Ruwoldt*, could not be done.) As to that, where a person agrees to do something which he cannot be compelled to perform, the contract will still hold good with regard to that portion of it which can be enforced unless it be opposed to public policy. Both parties knew that the land was under the Act when the lease was made, and as every man is taken to know the law it would be held that they knew they were inserting a provision in the lease which could not be enforced, namely, that as to right of purchase; besides, the point is immaterial, for if the agreement be void, then the payment of rent created a yearly tenancy, which was enough for the purposes of the defendant's argument.

J. W. Downer, on the same side.—The object of the Real Property Act was not to complicate but simplify the dealings with land. By the Act of 1857, which preceded the present Real Property Act, the provisions as to leasing lands were somewhat different from those contained in the amending Statute. Under

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

the former Act, Section 47, every lease without exception was made capable of registration ; and Section 50 of that Act providing the mode of surrender of leases said "wherever any lease of land under this Act is surrendered" certain forms were to be followed. The latter Statute, however, provides only for the registration of leases for more than three years, and the clause as to surrender (Section 48) speaks of the surrender of leases which *require* to be registered. Under the first Act there was but one class of leases, all of which required registration. Under the new Act there are two classes—those for less than three years, which are not capable of registration, and those for a longer period which require such registration. As the object, also, was simplification, and as nothing could be simpler than the Common Law method of dealing with short leases, which might be created by parol, it is to be presumed that the Legislature had that in mind when they excepted terms which could be so created from the operation of the Statute. It is noticeable, further, that in all the clauses of the Act relating to leases the words "lessor" and "lessee" are used, but if the section as to the remedies given to the landlord against the tenant be referred to, it will be found that there the language is "lessee or tenant," clearly showing the recognition of a relation distinct from the strict character of lessee under the Act. The Court will give some meaning to the word "tenant," which, if not having any signification, would not have been used. Section 114 of the Act of 1861, also, evidently contemplates the existence of instruments other than those capable of registration.

Way, Q.C., in reply.—As to the Act of 1857, allowing that the Legislature thereby intended to deal with all kinds of leases, it is to be observed that the repealing clause of that Act repealed all law inconsistent with it, and that repeal was continued by the Act of 1861.

Cur. ad. vult.

13 August—

Judgment herein was now delivered as follows :—

WEARING, J.—This was an action of ejectment brought to recover possession of a piece of land in the township of Kadina. At the trial a verdict was found for the plaintiff, with leave to the defendant to move to set it aside and have a nonsuit entered. For this purpose he has obtained a rule *nisi*. At the trial the plaintiff's title consisted of a certificate in his own name under the provisions of the Real Property Act, 1861. The defendant claimed under a writing made in the form prescribed for a lease by that Statute, which was signed by the plaintiff as lessor and by himself as lessee. By that document the plaintiff professed to let, and the defendant professed to take, the land in question at a rent reserved for a period of two years, which had not expired when the writ in the action was issued. There was also what purported to be a contract for the sale and purchase of the freehold during the term. The document was not registered in the Real Property Office. It was also proved that the defendant was occupying the premises at the date of the writ, and had paid rent to the plaintiff as his landlord up to the 28th July, 1873, which was subsequent to the date of his insolvency. I do not more particularly refer to the defendant's insolvency, or to the sale of his interest in the term by his assignees, because both those circumstances seem to be irrelevant to the present enquiry. The plaintiff then having shown a sufficient *prima facie* title, the only question is—Was it defeated by the defendant's evidence? And that depends chiefly upon what effect is to be given to an unregistered lease for a term not exceeding three years of land under the operation of the Real Property Act, as between a lessor and his immediate lessee. It is admitted that but for the provisions in the Real Property Act the document produced at the trial by the defendant would be a perfectly valid instrument of demise, and that the defendant's interest in the term it created was intact at the time the action was brought. But the plaintiff contends that the lease is void, as not having been registered in the Real Property Office. In support of this contention *Mr. Way*

referred us to the 39th Section of the Act. That section is as follows:—"No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money; but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or, as the case may be, the land shall become liable as security in manner, and subject to the covenants, conditions, and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments, executed by the same proprietor, and purporting to transfer or encumber the same estate or interest in any land at the same time, be presented to the Registrar-General for registration and endorsement, he shall register and endorse that instrument under which the person claims property who shall present to him the grant or certificate of title of such land for that purpose." He also called attention to the third clause, which defines an "instrument" to mean "any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate, or exemplification of will, or any other document in writing relating to the transfer or other dealing with the land." He also cited the 40th Section, which enacts that "notwithstanding the existence of any estate or interest, whether derived by grant from the Crown or otherwise, which, but for this Act, might be held to be paramount, or to have priority, the registered proprietor of land, or of any estate or interest in land, under the provisions of this Act shall, except in cases of fraud, hold the same, subject to such encumbrances, liens, estates, or interests, as may be notified in the folium of the Register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior certificate of title, or under a prior grant registered under the provisions of this Act; "and with further exceptions relating to omitted or misdescribed rights-of-way or other easements, and to misdescriptions of the land or its boundaries. *Mr. Way* contended that the document relied on by

the defendant, being an instrument within the definition given in Section 3 of the Act, conferred no estate or interest in the land ; and further, that no estate or interest passed from non-compliance with the requirements of the 39th clause as to registration, and that therefore the plaintiff, by virtue of the provisions of the 40th Section, held the land unencumbered by the defendant's term. In this conclusion I should be disposed to concur, were it not for the language of the 47th Section. That part of the clause which it is important to notice, is as follows :—"When any land under the provisions of this Act is intended to be leased or demised for a life or lives, or for any term of years exceeding three years, the proprietor shall execute a memorandum of lease in form E of the schedule hereto." Then the 48th Section thus begins :—"Whenever any lease or demise which is required to be registered," &c. The Act contains no provision expressly applying to leases for a term not exceeding three years. The inference I draw from the language I last quoted is that the Legislature intended to exclude from the operation of the Real Property Act all leases for a term not exceeding three years. When it is said that a certain provision shall apply to all leases for a term exceeding three years, are we not to infer that leases for a shorter period are excluded from its operation? *Expressio unius est exclusio alterius*. Again, is it not a necessary inference from language like this, "whenever any lease which is required to be registered by the provisions of this Act," that there is a class of leases which do not need to be registered? What may have been the motive which influenced the Legislature to make this exception I cannot say. It may be that the like reason weighed with them which led the Imperial Parliament to except from the operation of the 1st Section of the Statute of Frauds "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds at the least of the full improved value of the thing demised." At any rate, it appears to me that we are bound to give effect to this as well as to other portions of the Act ; and, unless the construction I have placed upon it is adopted, it seems that a landlord cannot demise land under the Real Property Act for any term not exceed-

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

ing three years—a doctrine which I need hardly observe would import very great inconvenience into the working of the Statute. But it may be objected that this interpretation directly militates with the decision this Court pronounced in the case of *Manning v. Crossman* (5 S.A.L.R., 130). No doubt from the report there does appear to be a conflict. But, as was pointed out by my learned colleague the Chief Justice during the argument on the rule, material facts are omitted from the report of that case, which serve to distinguish it from the present. There the defendant claimed under an unregistered lease for two years, which had been granted to him by a former freeholder, and therefore before the date of the certificate which vested the freehold in Magarey (under whom the plaintiff claimed). The question there was did Magarey take his title to the freehold subject to the defendant's prior unregistered lease? The Court decided that he did not. We were constrained to adopt that view, as otherwise we should have recognised the existence of an estate or interest in the defendant created by an unregistered instrument, which, as having been made antecedent to the certificate, claimed to be paramount or to have priority over the estate or interest conferred upon Magarey by his certificate. This would have been contrary to the express provision of the 20th Section of the Act. But the case now under consideration differs from *Manning v. Crossman* in this—that here a lease was made between the parties after the date of the plaintiff's certificate; and, unlike the lease set up in *Manning v. Crossman*, it did not purport to confer an estate or interest prior or paramount to that granted by the certificate. It may be objected that the effect of this decision will be to hamper the transfer or surrender of a certain kind of leases with formalities alien to the simplicity of the Real Property Act. The answer to this objection is simple. The Legislature has possibly overlooked such a result; at all events it seems to me that we ought to give full effect to the 47th and 48th clauses of the Act, although it may be at the sacrifice of what we consider a strictly logical sequence. In fact, whoever has had to consider the various sections of this Statute must, I think, admit the difficulty that exists in placing such an interpretation upon the several parts of

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

it as shall preserve between them a perfect harmony. Such a difficulty is probably a necessary incident to every new system which is concerned in many complicated details, and it is therefore no disparagement of a very useful measure to assert this of the Real Property Act. The old landmarks which had previously guided us have been removed, and experience has not yet supplied others in their stead. As Lord BACON says, "Things which have long gone together are, as it were, confederate with themselves, whereas new things piece not so well. But though they help by their utility, yet they trouble by their inconformity." I have endeavoured to the best of my ability, while adhering to the phraseology of the Act, to put upon it such a construction as shall best serve to alleviate its imperfections. The rule, in my opinion, should be made absolute. I cannot, however, say that I have arrived at this conclusion without considerable doubt.

GWYNNE, J.—This was an action tried before the Chief Justice on the 11th of November last. It was an action of ejectment brought to recover a piece of land situate in the township of Kadina, being portion of the Section numbered 113 in the plan of the said township. The defendant appeared to the writ, and defended for the whole of the land therein mentioned. On the trial it appeared that the land in question was under the new system of registration of title, and that the plaintiff was the registered owner of the whole of the Section No. 113; in proof of which he produced the usual certificate of title—a clean one, that is, having no encumbrance, lien, estate, or interest notified thereon. It further appeared that by an instrument in writing, dated 13th of November, 1871, but not registered, the plaintiff assumed to lease to the defendant the piece of land in dispute for a term of two years from the 13th November, 1871. I use the expression "assumed to lease" in order to signify that in my opinion the effect of the instrument upon which the defendant relies would have been a demise for two years had the property been under the old system instead of the new. Of course I assume that £55 a year "amounts unto two-third parts at the least of the full improved value of the thing demised" so as to satisfy the 2nd Section of the Statute of

Frauds, for otherwise the instrument under the old system in order to operate as a lease must have been by deed—Sec. 8 and 9 Vic., c. 106, s. 3. It further appeared that on the 22nd July, 1872, the defendant became insolvent, and that his assignees, in August, 1873, executed an instrument in writing, which, on the assumptions I have previously made, would, under the old system, operate as an assignment of defendant's term to Mr. W. Carvosso. It further appeared that there had been a demand of possession made on the defendant both by plaintiff and Mr. Carvosso before action brought. The learned Chief Justice, by consent of both parties, directed a verdict to be entered for the plaintiff, with leave for defendant to move to set that verdict aside, and to enter one for himself. Accordingly on the 2nd day of November last, *Mr. Stow* obtained a rule *nisi* to set aside the verdict for the plaintiff, and instead thereof to have a nonsuit entered on the following grounds :—

1. That the plaintiff had failed to prove his title.
2. That the evidence proved the legal right to possession either in the defendant, or a third party at the commencement of the suit.

Cause was shown during the last term, and the question was argued before the Full Court; and on account of the difficulty of interpreting the Real Property Act, we took time to consider our judgment. The question raised on the argument and which we have to consider is one purely and simply of construction, and it is this—Can a term for two years be created in land under the new system by an instrument in writing, but not registered? In order to get at the intention of the Legislature with regard to the question raised, it appears to me proper to refer to the Acts in *in pari materis* with the Real Property Act of 1861, although such Acts have been repealed; for however much the doctrine that a repealed Act of Parliament may be referred to to assist in the construction of another Act upon the same subject may have shocked some eminent Judges, it is an undoubted rule of construction. (See *Bussy v. Story*, 4 B & A., 98). I shall therefore avail myself of that rule on the present occasion by referring to the Real Property Act of 1860, for it appears to me that the spirit and object of the new system will be clearly seen and appreciated by two of its recitals. They are as follows :—“And whereas the preamble of

the first-recited Act (No. 15 of 21 Vic.) sets forth that the inhabitants of the province of South Australia are subjected to losses, heavy costs, and much perplexity by reason that the laws relating to land are complex, cumbrous, and unsuited to the requirements of the said inhabitants; and whereas for the effectual removal of the grievances therein set forth it is desirable to substitute for existing titles subject to impeachment or defeasance other titles which shall not be subject to impeachment or defeasance, and to compensate proprietors for loss or damage that may be occasioned by reason of such substitution, and that thereafter all transfers and other dealings with land shall be effected by means of registration of title, and not by means of deeds or other instruments, and that title to land or to any estate or interest therein acquired by registration shall be indefeasible, and not liable to impeachment." Thus, according to my apprehension, the very soul and spirit of the new system is that no estate or interest in land shall be created or transferred but by an act of registration. To the same effect is the 39 s. of the present Act—"No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act * * * But upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass." And to a similar effect are Sections 33 and 40. But it is argued that notwithstanding the above emphatic avowal of the principles of the new system, the introduction of the words "which is required to be registered by the provisions of this Act," in the 48th Section, taken in connection with the circumstance that the 49th Section requires leases for any term of years exceeding three years to be made in the form E of the schedule thereto, expresses the intention of the Legislature that a term for three years or less may be created in land under the new system precisely by the same means as it could by the ordinary law—that is, just as if the land were not under the new system—and that, therefore, the defendant must succeed on the strength of his lease. Now, examining these two Sections (47 and 48), and having in mind that the new system is a formulary one, it will at once be perceived that the whole effect of Section 47 is to prescribe the form in which leases for a life or lives, or for

a term of years exceeding three, shall be conceived—in form E of the schedule to the Act. This Section does not prescribe any form for leases of three years or less, nor does it use any language which would justify the conclusion that it is allowable to create estates of such short duration in land under the provisions of the Real Property Act of 1860 at all. And it appears to me that the 48th Section is still more remote from the question now before the Court, as its function is not to show what estates or interests may be created in land under the Act, nor to prescribe the use of any form for their creation, but simply to prescribe the manner in which leases when created are to be surrendered. But it is said the words, “which is required to be registered by the provisions of the Act,” imply that a lease or demise which does not require to be registered under the provisions of the Act may exist in lands brought under it. It must be admitted that there is a great want of precision in the language of the Real Property Act, and that in some cases it is very difficult, if not impossible, to arrive at any satisfactory conclusion as to the meaning of the Legislature. But fortunately we have the aid of the great luminaries of the law to guide us, and who have laid down rules or canons of construction which we are bound to observe. One of these rules of construction is, “The intent of the Legislature is not to be collected from any particular expression, but from a general view of the whole of an Act of Parliament”—*Per BEST, C.J.*, 4 Bing., 196. Again, in 7 B. & C., 543, Lord TENTERDEN lays down the same principle in these words:—“In construing Acts of Parliament, Judges are to look at the language of the whole Act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act they can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is their duty to give effect to the larger expressions.” Now, applying these principles of construction to the present case, and bearing in mind the intention of the Legislature as expressed in the repealed Act of 1860—that thereafter all transfers and other dealings with land shall be by means of registration of title, and not by means of deeds or other

instruments—it seems to me that I am bound to come to the conclusion that no estate or interest can be created in land under the provisions of the Real Property Act but by an act of registration. Although the instrument relied upon by the defendant is in the form prescribed by the 47th Section of the Real Property Act of 1861, it is not registered, and it seems to me therefore that to hold that by the effect of such an instrument the defendant became possessed of an estate for years is to violate the tenor and spirit of the Act. I will only add upon this part of the case that if the Legislature may have intended to provide for the creation of estates for terms of years, for three years or less, they have not carried their intention into effect. I can only say of the Legislature, using the language of Lord ELLENBOROUGH in a similar case, *quod voluit non dixit*. Even if the not providing a form specially applicable to terms of three years or less, and the not expressly declaring that such terms might be created without registration be regarded as constituting a *casus omissus*, still it cannot be supplied by the Court; for, as has been observed, that would be to make laws. “Judges are bound to take the Act of Parliament as the Legislature have made it.” But there is another view which may be taken of the case now before us. According to the contention on the part of the defendant, an estate for a term of three years or any less extent, may be created in land under the Real Property Act by the rules of the ordinary law just as if the new system had not been introduced. Even so, I take it that the estate for years so created would be of the nature of a term of years created by the ordinary law in property not under the Real Property Act, and that it would have the incidents—that is, the accessory rights and privileges of such last-mentioned term or estate; for I cannot assume that it was the intention of the local Legislature to introduce a new species into our *gradus* of estates. And at the present day the law of England protects the estate of a termor with the same diligence that it does every other estate; and no termor can lose his term without his own act or default. And it must be borne in mind that a term for years, unlike an estate of freehold, may be made to commence *in futuro*, so that if the defendant’s contention be upheld, land under the new system

might, by an unregistered lease, be demised to A for three years, and, after the expiration of the said term, to B for three years, and so on, *ad infinitum*; so that by the construction contended for it is clear that by a series of unregistered leases for terms of three years property may be, in effect, withdrawn from the new system by prescription; and further, that the whole of the evils which the Legislature intended to remedy would, to the extent of the ground opened up, be let in. And thus would the construction contended for be opposed to the well-established rule, that "a remedial Act shall be so construed as most effectually to meet the beneficent end in view, and prevent a failure of the remedy." Moreover, as it appears to me, the construction contended for would bring about a collision between the Supreme Court and the authorities of the Land Office. The Supreme Court would be bound to uphold the unregistered estate, and to protect it by means of all its legal and equitable rules and doctrines; but the Real Property authorities must wholly disregard all unregistered legal estates, or shut up their office. But the 33rd Section of the Real Property Act of 1861 provides that the certificate of title shall "be conclusive evidence that the person named in such certificate of title, or in any entry thereon, or as seised of or as taking estate or interest in the land therein described, is seised or possessed of such land for the estate or interest therein specified." In the present case the plaintiff produces in Court a certificate of title pure and clean, and therefore it seems to me to prove conclusively that the plaintiff is seised in fee, and, in the absence of notification of any encumbrance, lien, estate, or interest, that he is seised in possession, and not in reversion. On the argument of the rule, it was argued by *Mr. Way* that the merits of the case were with the plaintiff. Although that question would have no influence upon the Court when called upon to apply strict legal rules, and although at the first blush the contrary would appear to be the case, yet the facts bear out most abundantly *Mr. Way's* proposition. For if the instrument relied on by the defendant created a term of two years, that term, by the effect of the defendant's insolvency and the instrument put in by the plaintiff (being in point of law an assignment of that term) was at the time of the commence-

ment of the action vested in Mr. William Carvosso, and it appears from the evidence given on the trial that the action was brought by his authority. So that the defendant—the possession having been previously demanded of him by both the plaintiff and Carvosso—was at the time of the commencement of the action a mere trespasser, in one view as against the plaintiff, in the other against Carvosso; but at any rate the defendant had the mere naked possession without any right or title. Perhaps the plaintiff's legal advisers were influenced by their choice of the plaintiff by the authority of the case of *Manning v. Crossman*, decided by this Court on the 1st November, 1871, and reported in the fifth volume of the Local Reports, p. 130. And I must say that in my opinion they were right, for it appears to me that if it be conceded that an estate for three years or less can be created by instrument not registered, the case of *Manning v. Crossman* was wrongly decided. But looking at the report of that case, the arguments used at the Bar, and the observations of the Judges, I not only think that it was rightly decided, but also that decision governs the present case. The language attributed to the Chief Justice in that case is—“There is no doubt that a lease from year to year is an estate, but the Act says that a registered holder can only be subject to encumbrances on the register, and should be absolutely free from all others.” Mr. Stow interposes and says—“Is not a man estopped from setting up such an argument in Court in defiance of his own solemn act?” THE CHIEF JUSTICE—“I quite agree that he should be, but the question is, are we to administer the Act? I think that we are bound to do so, and the plain construction of it is that a person holding a certificate of title holds it absolutely free from encumbrances.” Myself and Mr. Justice WEARING concurred. The note of the reporter as to the point decided is—“A holder of a certificate of title holds it absolutely free from all encumbrances not notified thereon, and is therefore not bound by any demise not so notified.” Per GWYNNE, J.—“Under the Real Property Act a term of less than three years cannot be registered, and cannot therefore be created.” Even if I were in doubt as to the soundness of the opinion expressed by the Full Court in *Manning v. Crossman*, yet I would uphold the decision for reasons well expressed by an

illustrious Scotch Judge, Lord MACKENZIE, in these words, "that the general security of private rights and of civil life requires adherence to fixed rules and prior decisions by Courts of Law, and this occasionally leads to hardship in particular cases; but this particular hardship, after all, is a lesser evil than the general uncertainty and confusion that would spring up everywhere, were the discretion of Judges left entirely unfettered by positive rules." As I have already observed, the present case is in my opinion governed by the case of *Manning v. Crossman*, and in saying so I do not overlook the fact that in that case, although Manning was Crossman's lessor, yet he had subsequently sold the fee-simple to Magarey, and then in the action he rested his title on the lease derived from Magarey after the sale to him. Certainly if we were allowed to appeal to the principles of natural justice as opposed to the rules of positive law, Manning's position is low indeed as compared with that of the present plaintiff. By the law of England the estate of a lessee for years is as good and valid against the lessor's alienee, either with or without notice, as it is against the lessor himself. So says the law, and the reason is clear. It is because a termor's position is not that of a person having a license merely, nor that of a person having mere personal rights under an obligation, but he has a *jus in re*—an estate in the land. The lessee in such case does not require any assistance from a Court of Equity, though, if he did, his possession in fact of the subject of demise would be held to be notice to all the world of his actual estate. Now, it appears to me, that so far as justice and right are concerned, a lessor ejecting his own termor, and an alienee of a lessor ejecting a termor, of whose estate he had notice before he bought, stand upon the same level. In each case the ejector gets and converts to his own use a thing which he knows is the property of another against the owner's will. But our duty is clearly to administer the Act, which, as I understand it, says that all estates are to be created by an act of registration, and by no other mode whatever. We have similar instances of strict law under the old system. For instance, a person who buys land by word of mouth, although he pay the whole of the purchase-money, obtains no estate or interest at law or in equity. And

even if he take possession by the consent of the seller, the same law would hold, unless, indeed, the purchaser expended money in improving the estate, when equity would assist him. I think, therefore, the rule should be discharged, and with costs.

HANSON, C.J.—This was an action of ejectment brought by the registered proprietor of land under the Real Property Act to recover possession of such land from a person whose estate and interests, if any, did not appear upon the certificate of title. There can be no doubt therefore that *prima facie* the plaintiff would be entitled to a verdict; but the defendant contends that the estate or interest which he claims to possess is excepted from the operation of that Act, and is of a nature to entitle him to retain possession as against the present plaintiff. The facts which it appears material to consider are that the plaintiff being the registered proprietor of the land sought to be recovered, professed to demise it to the defendant for a term of two years with a right of purchase, by an instrument in writing in the form prescribed by the Act, dated 13th November, 1871, which instrument being a lease for less than three years was not registered. Under this lease the plaintiff took possession, and paid rent to the defendant, and continued to pay rent until the 28th July, 1873. Evidence was also given that the defendant had been insolvent, and that the assignees under the insolvency had sold his estate and interest in the land to one Carvosso, that notice had been given both by Carvosso and the plaintiff to determine the tenancy of the defendant, and that the present action was brought with the consent of Carvosso. But these facts appear to me to have no bearing upon the question we have to decide. The question as I conceive it, is whether a registered proprietor of land under the Real Property Act holds that land absolutely freed from any estate or interest not notified on the folium of the Register-book constituted by the certificate of title of such land, or whether letting a tenant into possession of such land and acceptance of rent from him create a tenancy as against himself, which is independent of the Real Property Act. I say this is the question as it appears to me; but it is necessary to notice the arguments

SUPREME COURT.

BUCKETT V. KNOBBE

COMMON LAW.

raised on behalf of the defendant, that inasmuch as leases not exceeding three years are not required to be evidenced by a memorandum of lease, they are therefore excepted from the operation of the Act, and are not invalidated by its provisions, so that the defendant would be entitled to retain possession by virtue of the lease executed by the plaintiff. As *Mr. Stow* put it—that the Real Property Act is a code, comprising the whole law with regard to everything that it includes, but leaving whatever it does not include to the operation of the law as it previously existed, and that leases not exceeding three years are not included; so that not only may a term for three years or less be created without writing, but also by deed, and all the incidents which attach to terms under the law of England continue to attach to these excepted terms. And in support of this view we were referred to Section 47, which applies only to leases for terms exceeding three years; and to section 48, which it is said expressly recognises the existence of leases which are not required to be registered; and to Section 119, which by using the word “tenant” as well as “lessee” implies necessarily that tenancies may exist that are not created by a memorandum of lease, and by speaking of terms and interests that have been determined by a legal notice to quit implies the existence of terms that are created by law, such as a tenancy from year to year. The argument arising from the effect of the 179th Section I shall have to consider hereafter, but it does not appear to me affect the question as to the validity of a lease in writing for a term not exceeding three years. This depends upon the construction to be put upon the 47th and 48th Sections, taken in connection with the other parts of the Act. What, then, is the effect of the professed memorandum of lease executed by plaintiff? Being a lease for a term not exceeding three years it is excepted from the operation of the 47th Section, and it was therefore contended that it was altogether excepted from the operation of the Act, so that it was not an instrument within the language of the 3rd Section; but it certainly is a “document in writing relating to the transfer or other dealing with land or evidencing title thereto;” and, if so, it comes within the express words of that section. But then it passes no estate or

interest whatever in the land, unless we are to hold that the omission of any notice of leases for a term not exceeding three years in Section 47 is equivalent to an enactment not merely that such leases are independent of the operation of the Act, but that the land itself, so far as relates to these terms, is no longer "under the provisions" of the Act. And I feel it very difficult to hold this. I agree that the Real Property Act constitutes a code, but the subject of that code is, I imagine, not particular estates in land, but the land itself—*i.e.*, whatever lands are brought under the operation of the Act; but if so, then it would follow that such land cannot be affected by any instrument, but only by its registration. I cannot so interpret the Act as to hold not merely that terms not exceeding three years can be created in lands under its operation by an unregistered instrument, but that such terms are to be subject to all the incidents of the old law, which it was the express purpose of the Act to abolish in respect of those lands, and could be assigned, mortgaged, underlet, and surrendered by instruments that passed an estate or interest in the land by their own inherent force and without registration. And it does not appear to me that any such interpretation of the Act is required. I am disposed to acquiesce in the argument of *Mr. Stow*, that in the absence of any express provision or necessary implication the former law subsists, for the Act only professes to repeal prior laws so far as inconsistent with its provisions; but the former law which this Act leaves unaffected is, I imagine, that law which permits the making of a lease for a term not exceeding three years without writing. But such a mode of demising of course excludes registration, since there is no instrument in existence to be registered. And this appears to me to be the proper construction of the Act—that it allows land to be demised for these terms orally, and without any writing to evidence the transaction. But as I read it, though no doubt another construction is possible, it does not forbid their being created by an instrument, though if they are so created such instrument must of course be in the form prescribed by the Act, and must be registered in order that the estate or interest which it creates should pass to the lessee. And this I take to

be the effect of the 48th Section, with which I was very much pressed at first. Leases made without writing and verbally for less than three years, such as I imagine the 47th Section to permit, cannot be and are not required to be registered, but any lease or demise which is made by an instrument, whether for a term exceeding three years or for a less term, must be in the form prescribed by the Act, and must be registered—is “required to be registered.” So that the distinction drawn by the 48th Section is not between leases for three years or less, and leases for a longer time, but between leases which are not evidenced by writing and leases which are so evidenced—the former not being, and the latter being required to be registered. And consequently there is no conflict between the 48th Section and the 39th. Undoubtedly, this construction seems to involve consequences which the framers of the Act can scarcely be supposed to have foreseen. For though they have allowed the creation of such terms without any memorandum in writing, they have not provided for their transfer or surrender. On the contrary, as they can only be assigned or surrendered (excepting by operation of law) by something which is an “instrument” within the terms of the Act, inasmuch as it must be a “document in writing relating to the transfer or other dealing with land;” and as such instrument would be presumably incapable of being registered (though upon this point I must guard myself from expressing any opinion), it would not be effectual to pass any estate or interest in such land. I am, however, clearly of opinion that the memorandum of lease relied upon by the defendant is an instrument within the meaning of the Act, and that not being registered it does not pass any estate or interest. I proceed, then, to consider the question as to the effect of the occupation of the premises by the defendant and his payment of a yearly rent to the plaintiff. The present case is distinguishable from that of *Manning v. Crossman*—which, as was pointed out in the argument, is incorrectly reported—and the report of which omits the point upon which, at least, my judgment proceeded—inasmuch as this action is brought by the registered proprietor, who, while such, has himself admitted the tenant into occupation and received the rent,

and not by his transferee. It appears, therefore, that the plaintiff is not within the provisions either of the 40th Section or of the 114th. The term claimed by the defendant is not one which would have priority over the certificate of title, and therefore is not affected by the former section, while the latter has of course no bearing upon the case. So that the question appears to me to narrow itself to this:—Does the Real Property Act forbid the existence of any interest or term in land under its provisions which is not evidenced upon the register? And upon the best consideration I am able to give to the subject I have, though after much hesitation, and with many doubts, come to the opinion that it does not. I have already expressed my opinion that it does not with regard to unwritten leases for a term not exceeding three years, and I think the same is the case with regard to a tenancy from year to year created by operation of law. I feel that to allow the creation of a term in this manner is to some extent inconsistent with what is obviously the general scope and intention of the Act; but in this as well as in the former case, it appears to me that there is a language which clearly recognises their existence, and to which in the absence of any express enactment to the contrary we are bound to give effect. The 119th Section recognises terms and interests in tenants who are not lessees, and recognises also a determination of such terms by a legal notice, which I consider to mean such a notice as is required by law in the absence of contract, and therefore to imply a term created by operation of law, such as a tenancy from year to year resulting from occupation and the receipt of rent; and I think we must give some effect to this language if there is any principle of law outside of the Act which enables us to do so. And it appears to me that there is such a principle. I consider the position of the parties in this case to be analogous to that which they would have occupied if the land had not been subject to the provisions of the Act, and the plaintiff had assumed to lease to the defendant for a term exceeding three years by an instrument not under seal. Such instrument would have been void as a lease, and would not have created any term, or of itself conferred any legal interest in the land upon the defendant; but, nevertheless, if the defendant

SUPREME COURT.

BUCKETT V. KNOBBE.

COMMON LAW.

had entered and paid rent, as he has in this case, he would have been a tenant from year to year upon the terms of that instrument so far as they were applicable to a yearly tenancy. And such I take to be the effect of the occupation and payment of rent by the defendant in this case. But here, also, I feel that there are almost insuperable difficulties, so great, indeed, as almost to repel me from the conclusion I have formed. For this term cannot, it would seem, be transferred to a third person or surrendered to the landlord by any document in writing, since the Act contains no provisions on the subject, and any document that might be employed for the purpose would be an instrument within the meaning of the Act, and therefore could have no effect without registration, while there does not appear to be any means of registering such instrument. Assuming in the present case the effect of the Insolvent Act to have been to transfer the term of the insolvent to his assignees, it is difficult to see how they could transfer it to a third party, for any instrument purporting to do this would apparently not be in accordance with the provision of the Act, and therefore could not be registered; and at the same time the landlord might, under the express language of the 114th Section, put an end to the term, and so defeat their interest by transferring the land to a third person who had full knowledge of the existence of such term, who gave a fair price for the land. These incidents of the term appear to me of themselves to lead very strongly to the opinion expressed by my learned colleague, Mr. Justice GWYNNE, and I think it quite possible that he is right; but just as I conceive myself bound to give effect to the 39th clause in spite of the inconvenience and hardship it may occasion, so here in the absence of any express provision to the contrary, I think I am bound to give effect to the established rule of law as to the effect of occupation and payment of rent, especially when it appears to be expressly recognised by the Real Property Act itself, in spite of the inconvenience which may result. The rule, therefore, will be made absolute.

Rule absolute.

SUPREME COURT. CHERRY AND ANOTHER V. FULLER. COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

25 MARCH AND 10 JULY, 1874.

CHERRY AND ANOTHER V. FULLER.

BILL OF SALE.—Act of Insolvency.

A Bill of Sale of all the property of a debtor is not fraudulent, so as to constitute an act of insolvency, if bonâ fide made in pursuance of an agreement entered into at the time of receiving the consideration, but delay in executing the bill of sale, and the circumstances under which it is executed, may be evidence of fraud, and should be left to the jury.

RULE *nisi* calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial granted, on the ground of misdirection by the Special Magistrate before whom the action was tried

The action, which was tried in the Adelaide Local Court before the Special Magistrate and a jury, was brought by the assignees of H. L. Durieu, an insolvent, for recovery of the proceeds of the sale of certain goods seized by the defendants under a bill of sale. The bill of sale, which comprised all the property of the insolvent, was executed within three months of the adjudication, to secure an amount advanced more than three months before such adjudication—the insolvent having at the time of the advance verbally agreed to execute such bill of sale. The Special Magistrate directed the jury that the execution of the bill of sale was an act of insolvency.

On the motion for the rule the following cases were cited:—

Harris v. Rickett, 28 L.J., N.S., Ex. 197.

Assignees Carruthers v. Noltenius, S.A.L.R.

2 July—

Stow, Q.C., now moved that the rule be made absolute.

Ingleby showed cause.—The real point relied on by the plaintiffs is that before the bill of sale was actually given a judgment had

H

SUPREME COURT. CHERRY AND ANOTHER V. FULLER. COMMON LAW.

been obtained against Durieu. The first ground I will take is that the bill of sale is void as not having been registered within the prescribed time, inasmuch as the agreement was made on April 24, 1873. By the Registration Act of 1841, it is expressly provided that within a stated time instruments, such as the one in question, are to be registered in order to prevent secret bills of sale. In England, the analogous provision is that contained in the Bills of Sale Act, 1854, under which it has been decided,

Exparte Brown, 28 L.T., N.S., 828,

that an unregistered agreement for a bill of sale does not bind property. But the agreement made between Durieu and the defendant was either an equitable assignment of the goods or it was nothing at all; and if an agreement, it came within the registration laws, and could not, therefore, be valid, being unregistered. It was contended on the other side that the plaintiffs relied upon the signing of the bill of sale being an act of insolvency, and that such execution was not an act of insolvency, inasmuch as there was not the fraud which would be necessary to make it so. It was held in

Exparte Fisher re Ash, 26 L.T., N.S., 931

that where money had been guaranteed on the security of a bill of sale the money is to be regarded as if actually advanced to the assignor. In that case there had been a promise to execute a bill of sale, but the execution of the deed was postponed, but finally accomplished shortly before insolvency. One point before the Court was whether the promise to the defendant was sufficient to take the bill of sale out of the category of fraudulent assignments. (GWYNNE, J.—That is whether the defendant did not make an advance to Durieu, or do something equivalent to advancing money.) Yes, but

Exparte Fisher, 26 L.T., N.S., 931,

decided that the making of the bill of sale was not to be postponed until the eve of insolvency. But further, by the Registration Act a bill of sale is either to be in writing, or the party having a charge

SUPREME COURT. CHERRY AND ANOTHER V. FULLER. COMMON LAW.

on the goods is to have possession of them also. The evidence, however, showed simply a verbal agreement, and nothing else was done until the bill of sale was signed at a time when Durieu was in insolvent circumstances; and then, also, it had been prepared by Durieu's solicitor, without any pressure on the defendant's part. (GWYNNE, J.—Does it appear when Fuller met his guaratee?) The defendant paid it out of the proceeds arising from the realization of Durieu's goods under the bill of sale. It is impossible to conceive a stronger case in which the purposes of the Registration Act would be defeated by allowing the defendants to succeed. It would have been different, too, if the party guaranteed had pressed the defendant. Again under clause 92 of the Insolvent Act, 1860, it is immaterial to consider whether the signing of the bill of sale was an act of insolvency or not, as by the section of the Act mentioned it is enacted that every bill of sale executed within three months of the filing of a petition of insolvency is null and void, and also, that a bill of sale is void as to any goods in the ostensible possession of the debtor at the date of committing an act of insolvency. (HANSON, C.J.—I understand *Mr. Stow's* contention to be that the plaintiffs have not proved Durieu to have been insolvent at the date of signing the bill of sale.) That appears as an admission in the Magistrate's notes.

Stow, Q.C.—I never admitted anything of the kind. It is clearly an error in the notes; and I may explain it by saying that the Magistrate was unable to take the notes himself at the trial through illness, and directed a clerk to do so. The whole of the defendant's case was in reference to the act of insolvency, and it would be absurd for me to have admitted it. All I had admitted was the petitioning creditor's debt. The whole question is whether the plaintiffs can prove their title as assignees under the insolvency. To do that they will have to prove an act of insolvency on the part of Durieu. The defendant denies the commission of any such act, and, consequently, alleges that the plaintiffs have no right of action. Where the adjudication is not received as evidence of the act of insolvency and appointment of assignees, the latter were put on proof of their title, notice having

SUPREME COURT. CHERRY AND ANOTHER V. FULLER. COMMON LAW.

been given them on the subject. That can always be done in cases where the assignees claim in respect of property which only vests in them by reason of the insolvency, and the issue before the Court arises out of a matter in which the insolvent himself could not have brought the action. The defendant, therefore, had a perfect right to dispute the plaintiffs' title. The point, then, is whether the verbal promise given at the time of the guarantee was sufficient to prevent the making of the bill of sale being an act of insolvency. It has been said that the agreement should have been registered, but the Registration Act clearly only contemplates the registration of certain documents; not, in short, the *factum* of the assignment, but the document under which such assignment has been made. The Court has already decided in the case of

Tyrie v. Warren

that where there has been an absolute sale-note of a horse, the assignment need not be registered, inasmuch as it does not come within the form of document contemplated by the Registration Act. Under the English Registration Acts, also, it had been decided that where the document is of a character not contemplated by the Acts, such Acts did not apply—

Fisher on Mortgage.

It is quite clear that the Legislature did not intend by implication to affect a majority of contracts which cannot be registered. (GWYNNE, J.—The Statute of Frauds would not affect the question.) No. Then the next point is whether the verbal agreement was sufficient to support the bill of sale, although the latter was not made until the assignor was in insolvent circumstances. The guarantee was equivalent to an advance of money, and

* *Harris v. Rickett*, 28 L.J. Ex., 197. 1 H. & N., 1,

decided that a bill of sale could be given in pursuance of a parol agreement. The question is whether the bill of sale is a fraudulent one, but that was rebutted by the fact of the agreement. As to the postponing of the signing of the bill being an inference

of fraud, the point was not taken in the Court below, and the jury found in opposition to it. It has also been proved that the neglect in the preparation of the instrument was due either to the mistake or carelessness of Durieu's attorney. There has been no suggestion that the execution of the deed was postponed in order that Durieu might continue obtaining credit.

Cur. ad. vult.

10 July—

HANSON, C.J., delivered the judgment of the Court herein as follows:—In this case a rule *nisi* was obtained by *Mr. Stow* on behalf of the defendant for a new trial, on the ground of misdirection, the alleged misdirection being that the Special Magistrate had directed the jury that a bill of sale of the whole property of the insolvent was fraudulent and an act of insolvency, although executed in pursuance of an agreement to that effect contemporary with the consideration for which it was given. Upon the argument it was conceded by *Mr. Ingleby*, on the part of the plaintiffs, that the ruling of the Special Magistrate was incorrect upon the particular point; but it was argued that the bill of sale was void upon other grounds, especially as not having been registered in sufficient time under the Act No. 5 of 5th Victoria. There was much weight in this argument, and it might, perhaps, have been argued with effect in the interpleader summons between Fuller and the defendant; but it is one altogether beside the point we have to determine, which is whether the property of Durieu vested in the plaintiffs as assignees by virtue of the adjudication of insolvency, and that depends upon the question whether the execution of this bill of sale was an act of insolvency. It was then argued that the delay in the execution of the bill of sale was, under the circumstances, evidence of fraud, the agreement having been made in April, and the bill of sale not having been executed by Durieu until December, nearly eight months afterwards, when he was in prison, and subsequently to the judgment obtained against him by the petitioning creditor. And we are of opinion that fraud might be inferred from such circumstances. But this would be a question for the jury, and was not

SUPREME COURT. CHERRY AND ANOTHER V. FULLER. COMMON LAW.

put to them. The rule for a new trial will, therefore, be made absolute; and the opinion of the Court upon the law connected with the subject is that a bill of sale of all the property of a debtor is not fraudulent so as to constitute an act of insolvency, if *bona fide* made in pursuance of an agreement entered into at the time of receiving the consideration, but the delay in executing the bill of sale and the circumstances under which it was executed may be evidence of the absence of *bona fides*, and should be left to the jury.

Rule absolute.

SUPREME COURT.

LEAN V. MAURICE.

COMMON LAW.

GWYNNE, ACTING C.J., WEARING, J.]

[COMMON LAW.

6 JUNE, 1873, AND 20 AUGUST, 1874.

LEAN V. MAURICE.

REGISTRATION ACT, 1841.—Real Property Act of 1861—Easements—Caveating capacity.

In accordance with the Registration Act of 1841, priority of registration to create priority of title must be by memorial as provided by such Act; and a registration under the Real Property Act is not such a registration as to give priority over a prior unregistered instrument.

There may be rights of way and other easements existent in respect of land under the Real Property Act of 1861, though such rights of way and easements do not appear on the register or certificate of title.

The owner of an easement has no caveating power, and semble easements are not in any way subject to the operation of the Real Property Act.

A and B (the mortgagors) and C (the mortgagee) of a section of land by indenture duly executed, but not fully attested, granted a right of way over the same to B. Subsequently C re-conveyed to A and B without mention of the right of way, and A and B applied to have the land brought under the provisions of the Real Property Act of 1861, and a clean certificate of title in their names was accordingly issued.

The land was afterwards mortgaged by A and B, and sold by the mortgagee to the defendant, but neither in the application nor in the certificate of title issued pursuant thereto, nor in any of the subsequent dealings, was any mention made of the right of way.

On action for obstructing the way,

Held—1. That there had been no registration, within the meaning of the Registration Act of 1841, such as to destroy the right of way vested in the plaintiffs.

2. That the certificate of title was evidence only that the person named therein as proprietor held the land subject to such encumbrances, liens, and interests, as were notified thereon, but that easements did not come within any of these definitions, and, consequently, there might be a right of way not so notified.

RULE *nisi* calling upon the defendant to show cause why the verdict obtained herein should not be set aside and a verdict entered for the plaintiff.

The action was tried in November, 1872, when a verdict was directed for the defendant with leave to the plaintiff to move to set aside the verdict and enter a verdict for the plaintiff with nominal damages.

The facts were as follows :—In 1862 Messrs. Mitchell and Tonkin being the mortgagors, and John Roberts the mortgagee of the fee-simple of Section 810 in the Hundred and County of Adelaide, granted a right of way over the same to William Lean, the plaintiff, his heirs and assigns, for ever, by an indenture which was never registered. Subsequently, John Roberts re-conveyed to Messrs. Mitchell and Tonkin by an indenture which was duly registered, and Messrs. Mitchell and Tonkin applied to have the land brought under the provisions of the Real Property Act of 1861. Pursuant to this application, a clean certificate of title was issued, and the land having been duly mortgaged under the above Act, was sold by the mortgagee, and transferred to the defendant, Price Maurice. Neither in the re-conveyance to Messrs. Mitchell and W. Tonkin, nor in any subsequent application or dealing, was any mention made of the right of way granted to the plaintiff.

Andrews, Q.C., and *Ingleby* now moved that the rule be made absolute.

Stow, Q.C., and *Boucant*, showed cause.—The question depends upon two points—the construction to be placed upon the Registration Act of 1841, and the conclusiveness of a certificate of title granted under the Real Property Act of 1861. On the first point, the plaintiff's claim to the right of way cannot be maintained, because by the third clause of the Registration Act of 1841 the conveyance to him, not being registered, is void as against the defendant, who claims under a registered re-conveyance, that re-conveyance being for a valuable consideration. By that clause, a subsequent conveyance for a valuable consideration has priority if neither deed were registered, and also if both were registered, unless the first conveyance was registered before the second. In this case the first was not registered at all. And it is unnecessary

SUPREME COURT.

LEAN V. MAURICE.

COMMON LAW.

that the second conveyance should be from the same person so long as it was made under the same title—

Warburton v. Loveland, 2 Dow. & Clark, Ir. Rep., 480.

It is said that registration of the first conveyance was rendered unnecessary by Act 27 of 1862, which did away with registration altogether. But that Act was repealed absolutely by No. 2 of 1865, excepting so far as related to suits then pending under its provisions; and, therefore, that Act being, so far as this suit was concerned, as though it had never existed, registration is still necessary to secure a good title. Then, as regards the defendant, his certificate of title is conclusive evidence. The 40th clause of the Real Property Act has not the effect of excluding from the operation of the Act rights of way created before the land was brought under it and not appearing on the certificate of title. In this case there was no means of knowing at the Real Property Office that the easement had been granted—

Hicks v. Powell, L.R., 4 Ch. Ap., 741.

Andrews, Q.C., in support of the rule.—As to the first point of *Mr. Stow's* argument, no one can obtain the advantages of the Registration Act who has not complied with its provisions. The defendant had never registered under that Act, and, therefore, was not in a position to take advantage of its provisions. The constrained construction put upon that Act has never been placed upon it before. The intentions of the clause, which has never been disputed, was to induce persons to register by offering an advantage to any who should as against any who should not. The grammatical construction, the preamble, and the title of the Act, all show it was never intended to have any effect whatever upon deeds unregistered. But then the deed conferring the right of way did not come into plaintiff's hands until the Act of 1862, abolishing registration, came into force; and the deed having been executed while registration was not law, no subsequent legislation could render it obligatory to register land acquired during that period. But, assuming it ought to have been registered, the plaintiff was

prevented in February, 1869, from registering by the action of those parties who, knowing of the outstanding right of way, yet brought the land under the Real Property Act without reference to it, and thus shut the plaintiff out from registering the conveyance of the right of way, without giving him notice of what they were about to do. Moreover, rights of way are expressly excluded from the operations of the Real Property Act by the 40th clause. And wisely so, for a right of way might exist for a long period without being used, and being thus forgotten it is very liable to be omitted from the register; therefore, rights of way were not brought under the Act.

Ingleby, on the same side.—The re-conveyance did not put the parties in the position of purchasers for value, because, the mortgage-money having been paid, the mortgagee was bound to re-convey the property. Besides, no action by two parties could prejudice the existing right of a third party—

Robinson v. Alcock, 5 B. & A., 142.

Cur. ad. vult.

20 August—

Judgment was now delivered as follows:—

GWYNNE, J.—This case was tried before the Chief Justice on the 20th day of November, 1872. It was an action of trespass for the obstruction of a right of way. The defendant pleaded three pleas, but it is only necessary to refer to the third plea, which was “that the plaintiff was not entitled to the right of way as alleged.” On that plea issue was joined. On the trial the plaintiff proved a grant of the right of way over Section 810, by a deed not dated, but signed and sealed by the several parties in whom the fee-simple was then vested. But the grant was not registered under the Act No. 8 of 5 Vict., intituled “An Act to provide for the registration of deeds, wills, judgments, conveyances, and other instruments.” It further appeared that John Mitchell and Charles Tonkin (two of the grantors named in the deed of

grant of the right-of-way) became seised in fee as tenants in common of Section No. 810, subject of course to the right-of-way in question; and that they, on the 14th day of June, 1869, made an application in the usual form to bring the Section 810 under the "Real Property Act of 1861." Whereupon the Registrar-General was directed to bring the land under the provisions of the said Act, which was accordingly done, and thereupon two certificates of title were issued, both dated the 7th day of September, 1869—one to Mitchell for three undivided fourth parts of the said section, and the other to Tonkin for the remaining one-fourth part. Neither in the application nor in either of the certificates is there any reference to the right of road so, as aforesaid, granted over the section in question. By a memorandum of mortgage, dated the 7th of September, 1869, Mitchell and Tonkin mortgaged the section to one John Baseby for securing £160 and interest; and default having been made in payment of the said principal money and interest, the said John Baseby, in exercise of the power of sale vested in him by the said mortgage and the Real Property Act of 1861, sold the said section to the defendant, to whom a certificate of title was issued by the Registrar-General. In none of those documents is the right-of-way alluded to in any manner. On the trial a verdict was found for the defendant, with leave for the plaintiff to move the Full Court. Accordingly *Mr. Ingleby* on the 4th March, 1873, obtained a rule calling upon the defendant to show cause why the verdict should not be set aside, and a verdict entered for the plaintiff, with 40s. damages, pursuant to leave reserved on the ground that evidence given at the trial proved that a right-of-way over the land, the subject of this action, had been legally granted to the plaintiff, and there was no evidence that such right-of-way had ceased to exist, or the grant thereof to bind the defendant at the time of the obstruction complained of. On the argument of the rule two points were raised by the defendant—first, that the grant of the right-of-way was not registered under the local Act, No. 8 of the 5th Vict., intituled "An Act to provide for the registration of deeds, wills, judgments, conveyances, and other instruments," and therefore such grant was void as against the defendant as a

subsequent purchaser by the effect of Section 3 of that Act; and, secondly, that the right-of-way, not being notified on the register or defendant's certificate of title, that certificate of title was conclusive evidence that the defendant was seised of Section 810 in fee-simple, free and discharged from the right-of-way in question. On referring to the Act No. 8 of 5 Vict., it will appear that the object of it was to prevent secret and fraudulent conveyances; that no one is compelled to register, the language of section 3 being "may," and that the effect or construction of any deed, conveyance, or thing registered is not altered or affected by the fact of registration, except as provided by the 3rd section. It, therefore, comes to this—Can a subsequent purchaser whose own deed or instrument is not registered have any preference over the deed of the first purchaser, whose deed likewise is not registered? I think he cannot. The language of the Act is, "shall be adjudged fraudulent and void at law and in equity against any subsequent purchaser . . . unless such memorial thereof be registered, as by this Act is directed, before the registering of the memorial of the deed . . . under which such subsequent purchaser . . . shall claim." On that language I have no doubt that it is an essential condition that the subsequent purchaser must register by memorial, as directed by the Act, before he can acquire any priority under it. It will be seen from the document put in evidence on the trial that the title of Baseby (the mortgagee), who sold to the defendant, and by consequence the title of the defendant, are both based on the new order of things introduced by the Real Property Acts, and that the defendant must stand or fall upon the effect of his certificate of title; and this brings me to the second point taken by the defendant. No doubt the question raised on that point is a very new one, and being a question of construction on the Real Property Act of 1861, is necessarily a very difficult one. I would premise that a right-of-way is an incorporeal hereditament. In *Bla. Com.*, vol. 2, p. 17, these hereditaments are defined thus:—"An incorporeal hereditament is a right issuing out of a thing corporate, or concerning, or annexed, or excisable under the same. It is not the thing corporate itself, but collateral thereto."

Now the question is, are incorporeal hereditaments within the provision of the new system? In other words, was the defendant's certificate of title conclusive against the plaintiff's right? As far as I am able to understand the Real Property Act, the evidentiary faculty with which the certificate of title is invested is this—it proves that the person who is named in it is seised of the land described in it, though subject to such encumbrances, liens, estates, or interests (if any) as are notified on the folium of the register, but absolutely free (what from?) from all encumbrances, liens, estates, or interests whatever, except . . . “and except so far as regards the omission or misdescription of any right-of-way or other easement created in or existing upon any land” (see the 33rd and 40th sections), which I suppose means that in spite of the certificate, the registered proprietor is to hold his land subject “to any right-of-way created in or in existence upon (*sic*) his land.” So that I come to the conclusion that the defendant's certificate of title was not conclusive against the plaintiff's right. But independently of the particular provisions of the 33rd and 40th sections, I am disposed, from the whole tenor of the Real Property Act of 1861, to come to a conclusion in favour of the plaintiff, for the language of the Act throughout points to “land and estates, and interests in land,” as the peculiar and appropriate subjects of its cognizance. For instance, the applicant for registration under the 15th section is required to state the nature of every estate and interest held therein (*i.e.*, in the land) by any other person, whether at law or in equity; but he is not required to state anything as to any easements created therein. Then by Section 22 a person in order to lodge a caveat must claim an “interest” in land, and must particularize “the estate, interest, lien, or charge claimed,” none of which words are applicable to an incorporeal hereditament. I might refer to 33, 39, 40, 41, and other sections of the Act for the same purpose, but I think it unnecessary. In the case before the Court no one can justly say that anyone concerned in the registration of the Section 810 acted improperly, nor can it be said that the plaintiff was guilty of any negligence, for the only thing that can be suggested against him is that he did not lodge a caveat; but the answer is, he had

no caveating faculty, he could not claim an interest in the land, for he had none. And it appears to me that the language of the Legislature must be very clear and precise in order to induce this Court to conclude that it meant a person to be deprived of his right without any act or default on his part. The 42nd and 43rd sections have reference to the creation of covenants in lands after registration under the new system, but have no bearing upon the present question. I, therefore, am spared the necessity of criticising them. I will, therefore, only say that they are miserably defective. On the whole I have to come to the conclusion, for the reason I have given, that the rule must be made absolute and with costs.

WEARING, J.—I concur in the opinion of my learned colleague. At first I had some doubts on the main question at issue, but after consideration I have come to the conclusion that a right of way is an easement, which it is not necessary should appear on the Register-book containing particulars of land under the Real Property Act.

GWYNNE, J.—I wish to explain that the rule was argued when the Chief Justice was Acting-Governor. Consequently, the judgement is that of the remaining members of the Court.

Rule absolute.

SUPREME COURT

DAVIES V. JONES.

COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

21 AUGUST, 1874.

DAVIES V. JONES.

CONSIGNEE.—Damage—Property in goods.

A consignee of goods, forwarded to him by an English principal, for sale on terms that consignor and consignee share profit or loss, has a sufficient property in the goods to maintain an action on the bill of lading against the carriers of such goods for injury to the same while in transit.

RULE *nisi* calling upon the plaintiff to show cause why the verdict obtained should not be set aside and a new trial granted, on the ground that the plaintiff as consignee had not proved that he had any property in the goods. On the granting of the rule the following cases were cited :—

Dicey on Parties, 86

The *Nepoter*, 22 L.T., N.S., 177

The *Freedom*, 24 L.T., N.S., 452

The *Figlia Maggiore*, L.R., 2 Admir., 106

The *St. Cloud*, B. & L., 4.

The action was tried in the Adelaide Local Court, when a verdict was entered for plaintiff.

The evidence at the trial showed that the goods were consigned to the plaintiff on the terms that he was to share profit or loss equally with the consignee, and that a sum of £400 had been transmitted by the plaintiff to the consignor, but whether before or after the damage was discovered was not stated.

Stow, Q.C., now moved that the rule be made absolute.

Way, Q.C., showed cause.—The plaintiff's position is that of a consignee having an interest in the consignment, and, therefore, even prior to the alteration in the law as to the transfer of rights of action under a bill of lading, the plaintiff would be entitled to

recover. A bill of lading is an instrument of title, and the property mentioned in it passes by endorsement, although the right of action on it would not prior to the new Act. The case of a consignee, however, is stronger than that of a simple endorsee. As between a principal and a factor, the bill of lading vests the property in the goods in the consignee, though the principal has a right to take back the goods at any time, and from the date of his making a demand for possession the property re-vests in him, and he can maintain an action for trover.

Lickbarrow v. Mason, 1 Smith's L.C., 699.

But in the case of a consignee having an actual interest in the goods, the right of re-vesting is taken from the consignor, and the property is in the consignee absolutely under his bill of lading; and where he pays freight he has an undoubted right to sue in respect of any injury done to the goods. (GWYNNE, J.—I imagine that an auctioneer selling on commission could sue a person refusing to take any article knocked down to him. The auctioneer would be interested to the extent of his commission.) In

Bullen & Leake on Pleading

there is a distinct form for a declaration by a consignee with an interest against the carrier. Independently of the Bills of Lading Act, No. 25 of 1859, the plaintiff is entitled to his verdict; but under that Act his right is indisputable. The nature of the arrangement between the plaintiff and the consignors, too, was really that of a sale, with a particular mode of payment for the goods. The bulk of the articles were ordered by the plaintiff, invoiced to him, and he remitted to England on their arrival, subject to the arrangement as to the result of the speculation. In the particular instance before the Court £400 has been remitted to the consignors. (*Stow, Q.C.*—After the plaintiff discovered that the goods were injured.) There is nothing in the evidence to show that, but the fair inference from it is precisely the other way.

SUPREME COURT.

DAVIES v. JONES.

COMMON LAW.

With reference to the cases referred to in moving for the rule, they are really authorities for the plaintiff.

The Saint Cloud, B. & Lush, 4,

has been really overruled, and there the plaintiff was a nude endorsee—a mere agent for sale, who had made no advance and had no interest in the goods.

The Nepoter, 22 L.T., N.S., 177

The Figlia Maggiore, L.R., 2 Adm., 106

The Freedom, 24 L.T., N.S., 452

are all authorities in support of the proposition that where the consignee has an interest in the consignment he can maintain an action for damage done to the goods. It is not requisite that the entire property should pass to the consignee. If the consignee were a mere agent, of course he could not sue. (HANSON, C.J.—I understood the plaintiff to say in effect in his evidence that if there were a loss of £100 in the consignment he would have to pay £50 of it) That is so. The plaintiff also could maintain an action in tort as well as on the contract—

Dracachi v. Anglo-Egyptian Navigation Company,
L.R., 3 C.P., 190.

But the defendant also contends that he would be liable to an action at the suit of the consignor. That is begging the whole question; and, besides, where two persons have one the actual and the other a special property in goods, the recovery of damages by one is an absolute answer to an action by the other. The cases, however, show that where a person has a limited property, he can recover in his own right.

Stow, Q.C., in reply.—The whole argument turns on the question as to whether the property in the goods, the subject of the action, vests in the plaintiff. It cannot be disputed that prior to the Bills

of Lading Act, 1859, where a person consigned goods for sale by an agent, who had not advanced against them, there could be no right of action on the bill of lading except by the person who made the contract. In other words, the consignee could not sue unless the consignor was merely an agent in shipping the goods. The position of a consignee and the endorsee of a bill of lading were, therefore, analogous in that respect—

Abbott on Shipping.

Under the new law, however, any consignee with an interest can sue. The broad distinction here is that whether a consignee is paid by commission or out of the proceeds he is still but a bare factor. It has been said that the plaintiff had remitted to England before the injury to the property had been ascertained, but there is nothing in the evidence to show any obligation to do so, even if it were done, before the property had been sold. (HANSON, C.J.—It is clear to my mind that at any rate the plaintiff was responsible for half of any loss accruing from the transaction.) (GWYNNE, J.—I cannot come to any other conclusion than that the consignor evidently intended to vest the property in the goods in the consignee.) My point is that at least a large portion of the goods was not sent to the order of the plaintiff, but simply forwarded to him for the purposes of sale. The obligation on the part of the consignee to pay half of any loss did not divest the consignor of his property in the goods. (HANSON, C.J.—Do you say that the consignor could have sent out to a third party and told him to take possession of the property?) Yes. (HANSON, C.J.—I cannot think so.) If the Court are so strongly against me, I will not press the matter further.

GWYNNE, J.—If the consignor sent out to the third party, as suggested, and the plaintiff applied to me as Primary Judge on the Equity side to restrain the party from taking possession, I should be bound to support him.

Rule discharged with costs.

SUPREME COURT. TUMBLING WATERS CO V. JURIET. COMMON LAW.

HANSON, C.J., WEARING, J.]

[COMMON LAW.]

28 MAY AND 25 AUGUST, 1874.

THE TUMBLING WATERS FREEHOLD COMPANY V. JURIET.

COMPANIES ACT, 1864.—*Prospectus—Articles of Association.*

A person placed on the register of a Company, pursuant to an application made on the faith of a prospectus, is not liable to such Company for calls subsequently made if there are material discrepancies between the objects set out in such prospectus and in the Articles of Association, even though such person may not have taken any steps on being aware of such discrepancies to remove his name from the register.

The prospectus set out that "the objects for which it is proposed to form this Company are to purchase from the owner thereof a freehold section, No. 614, in the Hundred of Casenagh, Northern Territory . . . for the purposes of gold mining, and for such other purposes as are set out in the Memorandum and Articles of Association to be adopted as hereinafter mentioned."

The Memorandum of Association set out in addition that the objects of the Company were "the prospecting, digging, &c., for gold and other minerals in the said Northern Territory; the acquisition by lease or purchase or otherwise of all lands in the said Northern Territory whereon or wherein such discoveries may be made; the working of the said section, and of any claims, mines, or mineral property in the said Northern Territory which may be acquired by the said Company."

On the faith of the above prospectus, the defendant applied for shares in the proposed Company, and on the formation received notice of allotment and subsequent calls, none of which were paid by him, but took no proceedings to remove his name from the register.

On action for Allotment and Directors' calls,

Held—That the defendant had never agreed to join such Company as that constituted by the Memorandum of Association, and was entitled to a verdict.

Under the above circumstances, however, the defendant having from the first been aware of the variance between the Prospectus and Articles of Association, and taken no steps in the matter until the failure of the Company, the Primary Judge subsequently refused to order his name to be removed from the register of shareholders.

SPECIAL case reserved by the Special Magistrate of the Adelaide Local Court.

The action was for £5, amount of a Directors' call of 6d. per share on 200 shares. At the trial it was proved that the defendant had applied for the shares on the strength of a

SUPREME COURT. TUMBLING WATERS CO. v. JURIET. COMMON LAW.

prospectus, which set out that "the objects for which it is proposed to form this Company are to purchase from the owner thereof a freehold section, numbered 614, in the Hundred of Cavenagh, Northern Territory, containing 320 acres, immediately adjacent to the Tumbling Waters, for the purposes of gold mining, and for such other purposes as are set out in the Memorandum and Articles of Association, to be adopted as hereinafter mentioned." The defendant, however, never paid the allotment call, and when interrogated on the subject by the Secretary repudiated any connection with the Company whatever. It was contended on his behalf, first, that the register of shareholders was insufficient to constitute *prima facie* evidence of his being a member of the Company; and secondly, that there was a substantial variation between the prospectus and the Memorandum and Articles of Association, such as to afford a good defence to the plaintiffs' claim.

Sheridan, for the plaintiffs.—It will be contended on behalf of the defendant, as to the alleged variation between the prospectus and the Memorandum of Association, that the objects stated in the latter should not have gone beyond the working of the one section 614, and that the words in the prospectus, "and for such other purposes," were intended to refer back to the said section. Such a construction, however, would be ungrammatical, it being remembered that the plural noun "objects" was used. There is also a clear and distinct reference in such prospectus to the Memorandum and Articles of Association, and the defendant's attention has, therefore, been sufficiently directed to them to allow of him satisfying himself as to their contents. (HANSON, C.J.—It appears to me that the natural inference that a person would draw from the prospectus was that the Company's operations were to be limited to the one section.) Assuming that to be so, the length of time which the defendant allowed to elapse between his application for the shares and his repudiation of any connection with the Company was such as to constitute sufficient *laches* to deprive him of any advantage from such repudiation—

Lawrence's case, L.R., 2 Ch. App., 412

Taité's case, L.R., 3 Eq., 795.

SUPREME COURT. TUMBLING WATERS CO. v. JURIET. COMMON LAW.

(HANSON, C.J.—There is a distinction between the cases cited and the defendant's position, which latter is that he never agreed to become a member of such a Company as that which was ultimately formed under the Memorandum and Articles of Association. In both the authorities mentioned, the defendants were clearly shareholders, and had recognised their position as such.) (WEARING, J.—The question is—Did the defendant receive and accept the shares?) (HANSON, C.J.—The words of the application form were that the shares were to be taken "subject to the prospectus.") It is the duty of an applicant for shares to acquaint himself with the terms of the Memorandum of Association of the Company he proposes to become a member of—

Buckley on Joint Stock Companies.

With reference to the sufficiency of the register, it is clear from the case of the

East Gloucester Railway Company v. Price, L.R., 3 Ex., 15,

that the statutory provisions as to such register are merely directory.

HANSON, C.J.—It is not necessary to call on the counsel for the defendant. The second question, as to whether the variation between the prospectus and the Memorandum of Association constituted a good defence to the action, must be answered in the affirmative. The prospectus is entitled as that of a "Freehold Gold Mining Company," and the whole tenor of the document shows the intention to have been to work for gold on the one section, 614. The Memorandum of Association altogether departed from that, it being set out in addition that the objects of the Company were "the prospecting, digging, sinking, working for gold and other minerals in the said Northern Territory; the doing all things necessary for securing to the said Company the benefit of any gold or other mineral discoveries which may be made in the said Northern Territory; the acquisition by lease or

purchase or otherwise of all lands in the said Northern Territory whereon or wherein any such discoveries may be made, together with all rights, benefits, and advantages appertaining thereto, under and pursuant to the regulations which have been or may hereafter be issued or made with respect to mining for gold in the said Northern Territory, or by any other lawful ways and means; the working of the said section, and of any claims, mines, or mineral property in the said Northern Territory which may be acquired by the said Company." It will be seen at a glance that the variation is so great as to constitute quite a different Company, and no person who had applied for shares under the original prospectus could be reasonably held as bound by the extended operations contemplated by the Memorandum of Association. Then the defendant, further, has not accepted allotment of the shares or in any way recognised his connection with the Company, although his name was placed on the register of shareholders. In fact, he all along took the position that he never agreed to join such a Company as the plaintiffs'. It has been argued that his right of repudiation was barred by his *laches*. It is quite certain that a person after applying for shares in a Company should take care to inform himself as to the proposed Memorandum and Articles of Association. (*Ingleby*—They were not in existence till some time after the defendant entered his application.) That would, of course, materially affect the case. The one great point, however, is whether the defendant ever contemplated a Company such as the one set forth in the Memorandum of Association, and on that my opinion is against the plaintiffs.

WEARING, J.—I concur in the opinion expressed by the learned Chief Justice. It appears that the defendant was sued as a contributory to the funds of a Company totally different to the one he purposed associating himself with, and, therefore, he had a perfect right to object to the imposition of any such liability. A great deal has been said lately in reference to the Companies Act, 1864; but it would, on consideration, be found to contain nothing magical, and to be intended merely to simplify the procedure in Company matters. Returning to the case before the Court, the

SUPREME COURT. TUMBLING WATERS CO. v. JURJET. COMMON LAW.

prospectus clearly pointed to the one section as the sphere of operations; but the Memorandum of Association disclosed a much wider field. As to the defendant's name being on the register, there were two essentials to membership—the first was an agreement to join the Company, and the second, the placing of the name on the register; but the defendant had never brought himself within the first of those. The answer to the case should be that the defence was a good one.

25 August—

Mr. Juriet having subsequently applied to have his name removed from the register of shareholders.

GWYNNE, Primary Judge, delivered judgment as follows:—This was an application by Mr. Juriet to have his name removed from the register of shareholders of the Company. The facts were very simple. Mr. Juriet applied for shares on June 9. At that time the Company had not been formed, but a prospectus had been issued and published. On June 12 Mr. Juriet was informed that 200 shares had been allotted to him, and the 2s. 6d. per share application-fee duly credited to him. The Company was formed in due course, and Mr. Juriet's name entered in the register. Whether such register contained at that time all that it should have done I will not say. I do not think it did. However, Mr. Juriet's name was entered. Subsequently, an application was made for the allotment call of 2s. 6d. per share, and later still a Directors' call was made, which also Mr. Juriet has not paid. At a chance interview between the shareholder and the Secretary of the Company, the former flatly refused to meet the liability to which the Company considered him to be liable. Mr. Juriet, however, took no steps to procure the removal of his name from the register of the Company. He gave no reason to the Secretary for not regarding himself a member of the Company, and did not definitely repudiate his connection with it. The Company afterwards brought an action in the Adelaide Local Court to recover the amount of the calls alleged to be due by Mr. Juriet. The Special Magistrate, however, decided in favour of the defendant. Mr.

SUPREME COURT. TUMBLING WATERS CO. V. JURJET. COMMON LAW.

Juriet then applied on the Equity side of the Supreme Court to have the register of the Company rectified by the removal of his name therefrom. The alleged cause of Mr. Juriet's withdrawal from the Company was the difference between the language of the prospectus on which the Company was formed and the Memorandum and Articles of Association as ultimately settled. There can be no doubt that there was a monstrous variation in the direction indicated. The original idea clearly had been, as was intimated by the name, to purchase and work a "freehold" section, but under the Articles of Association the objects of the venture were monstrously extended. But I do not think it necessary to dwell upon the aspects of the case. The principal cases relied on in support of the application were *Ship's* case, L.R., 1 Ch., 511, 514, and *Stewart's* case. The main point at issue was—when did Mr. Juriet first become aware of the variance on which he relied. In *Stewart's* case, the applicant made a distinct affidavit that he was only aware of the ground on which he based his application within three weeks of the time when such affidavit was made. Then, in *Ship's* case, which preceded *Stewart's* case, and governed it, there was an affidavit showing the precise day when the applicant became aware of the variance on which he moved the Court. It is evident, therefore, that the time when the shareholder first knew of a valid objection to his further continuing his connection with the Company is the one point to be considered. If that be so, I cannot relieve Mr. Juriet from his liability. A shareholder cannot stand by until it is established that the speculation is a failure, and then turn round and say he was not a member of the Company. There is certainly nothing to show the exact date when Mr. Juriet discovered the variance between the prospectus and the Articles of Association, and, therefore, I have to form the best judgment I can on the point. But, although I am not quite satisfied on the point, I think the presumption is all one way. Before the inferior Court, and all through the subsequent proceedings, Mr. Juriet set up and relied upon the variance, and, therefore, it must be presumed that he was aware of it from the first, and that it formed the basis of his objection to pay the calls. The motion will be discharged, and with costs.

Motion discharged.

SUPREME { IN THE MATTER OF THE MATTAWARRANGALA } EQUITY.
COURT { COPPER MINING COMPANY, LIMITED. }

GWYNNE, J., PRIMARY JUDGE.]

[EQUITY.

22 SEPTEMBER, 1874.

IN THE MATTER OF THE MATTAWARRANGALA COPPER MINING
COMPANY, LIMITED.

COMPANY.—Forfeiture of Shares—Articles of Association.

By resolution passed at a General Meeting of the shareholders the Directors of a Company were instructed to forfeit all shares tendered to them for forfeiture on which all calls had been paid up to date.

Pursuant to these instructions the Directors accepted forfeitures of a number of shares.

On the winding up of the Company by the Court,

Held—That the above resolution was ultra vires, and that the Directors could not without the consent of every member of the Company exercise a power of forfeiting shares where no ground of forfeiture existed, and that the names of the holders of shares removed from the register pursuant to such resolution must be included in the list of contributories as existing members of the Company.

APPLICATION by certain shareholders of the Mattawarrangala Copper Mining Company, Limited, which was being wound-up under the supervision of the Court, to have the list of contributories amended by the addition thereto of the names of the former holders of 359 shares under the following circumstances :—On June 22, 1870, at a general meeting of the shareholders, it was resolved —“That it be an instruction to the Directors from this meeting to forfeit all shares tendered to them for forfeiture on which all calls have been paid to this date.” Acting upon this, the holders of 359 shares in the Company paid up all calls due, left their scrip with the Secretary for forfeiture, and the Directors accepted such shares as forfeited, and removed the names of the shareholders from the register of the Company. The holders of 740 other shares also paid up their calls and left their scrip at the Company’s office ; but, from some unexplained cause, these latter shareholders were not removed from the register. On the Company being wound up by the Court, the official liquidator brought in his list of con-

SUPREME } IN THE MATTER OF THE MATTAWARRANGALA } EQUITY.
COURT. } COPPER MINING COMPANY, LIMITED. }

tributories, made up in accordance with the usual practice, from the register as he found it, thus excluding the holders of the first-mentioned 359 shares, but including the holders of the 740 shares. Several of the latter attended the settlement of the list of contributories, and contended first, that they also should be excluded from the list as having *bona fide* acted upon the resolution; or, secondly, that, if they were retained, the holders of the 359 shares should also rank contributories. The liquidator appeared before the Primary Judge, and submitted to such order as the Judge might deem right.

The question having been argued in Chambers,

GWYNNE, P.J., delivered judgment as follows:—In connection with this Company, which is being wound up by the Court, the liquidator has prepared a list of contributories for settlement. Certain of the shareholders, however, claim to have the list altered by the insertion of the names of other persons said to hold upwards of 1,000 shares. I think that the application for the amendment of the list of contributories should be granted, but it being a matter of importance and some public interest I have decided to express my opinion on the matter in open Court instead of deciding the matter in Chambers. It appears the Company was formed under the Companies Act. The capital was made up of 3,800 shares at £3. Out of this number 1,500 free shares were reserved to the proprietors, leaving 2,000 shares liable for calls. Under clause 16 of the articles of association of the Company, such shares are transferable, a form being set out which requires to be signed by the transferor and transferee. The usual powers are vested in meetings of the Company. Then section 57 of the articles of association provides that the Directors of the Company, may make calls of not more than five shillings per share and at not less than two months' intervals. Notice of all calls was to be given by the Directors according to the prescribed form, and there is also a provision that, notwithstanding the forfeiture of shares for nonpayment of such calls, all prior calls remaining unpaid at the date of forfeiture are recoverable from the shareholders. A

SUPREME COURT.	{	IN THE MATTER OF THE MATTAWARRANGALA COPPER MINING COMPANY, LIMITED.	}	EQUITY.
-------------------	---	---	---	---------

power is also given by which forfeited shares may be reinstated on certain terms. The Company continued to work for a considerable time, and the Directors then did an extraordinary act by virtue of a resolution passed at a meeting of shareholders. They, acting as I believe quite *bona fide*, agreed to accept as forfeited 1,070 shares in the Company held by different persons. About 359 of such shares were registered in the books of the Company as actually forfeited; but as to 740, although surrendered, there was no minute of their forfeiture in the books. The question then arose whether the instructions to the Directors contained in the resolution referred to were not entirely *ultra vires*. I think they were. The forfeiture was clearly for the benefit of the shareholders alone. The Company could gain no advantage from it, and Lord CRANWORTH very clearly put a similar case in his judgment in *Spackman v. Evans*, 32 L.J., Part I., 762, where he said:—"The deed, it is true, gives to the Directors the power of declaring a forfeiture of shares, the holders of which refuse or neglect to pay their calls; but it is plain that this is a power intended to be exercised only when the circumstances of the shareholders may make its exercise expedient for the interests of the Company, not a power to be exercised for the interest or supposed interest of the shareholder." In the case under consideration the Directors received the call due, and then the scrip is marked as forfeited. It appears to me that the meaning of a forfeiture of shares was something done *in invito*; but the matter as presented to the Court assumed more the complexion of a contract, so that while pretending to do one thing, the Directors had actually done something of quite a different character. It was quite absurd to call the transaction a forfeiture of the shares, when in fact it was simply an agreement. In other words, when no ground for forfeiture existed the Directors had exercised their powers in relation to such forfeiture. I think the whole transaction is absolutely void, and shall order that the several shareholders in question be placed upon the list of contributories. The extraordinary proceeding which had been referred to was one in which every shareholder would have to specifically concur, or such acquiescence, with knowledge of the facts, would have to be shown

SUPREME COURT.	{	IN THE MATTER OF THE MATTAWARRANGALA COPPER MINING COMPANY, LIMITED.	{	EQUITY.
-------------------	---	---	---	---------

as would amount to a concurrence. Probably the Company felt the difficulty of proving such to have been the case with reference to each individual shareholder, and therefore the point had not been taken.

*Ordered that the list of contributories be amended
and the liquidator's costs paid out of the funds.*

SUPREME COURT. } YAM CREEK GOLD MINING CO. } COMMON LAW.
 } V. WADHAM. }

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.]

24 SEPTEMBER, 1874.

YAM CREEK GOLD MINING COMPANY V. WADHAM.

COMPANY.—Increase of Capital—Articles of Association—Special General Resolution.

Before increasing the Capital of the Company by the issue of additional shares, pursuant to a power contained in the Articles of Association, no special resolution authorizing the alteration of the "regulations of the Company as originally framed" is necessary within the meaning of Section 12 of the Companies Act of 1864.

SPECIAL case from the Local Court of Adelaide.

The action was for calls. On the trial it appeared that at special general meetings resolutions were passed affirming the desirability of increasing the capital, pursuant to a power contained in the Articles of Association, by £7,000, by the issue of 7,000 £1 shares, and the Directors accordingly took the necessary steps in the matter. The calls now sued for were in respect of this new issue of shares.

Judgment was given for the plaintiff, subject to the opinion of the Supreme Court—Whether prior to passing a resolution to increase the capital of the Company it was necessary for the Company to have altered by special resolution the conditions contained in the Memorandum of Association of the Company.

Sheridan, in support of the judgment.—Clause 12 of the Companies Act, 1864, provides that any Company limited by shares, "if authorized to do so by its regulations," may modify the conditions of its Memorandum of Association so as to increase its capital. The Act contemplates two classes of cases—those in which under their articles the Company have the power mentioned in clause 12, and those in which they have not. With regard to the latter sections, 49 and 50, the Act allows them to alter their regulations by special resolution passed at a general meeting of shareholders, and subsequently confirmed. A copy of any such special resolution is, under section 52, to be filed with the

SUPREME COURT.	} YAM CREEK GOLD MINING CO.	{ COMMON LAW.
	V. WADHAM.	

HANSON, C.J.—As to the last point, the plaintiffs have not altered their Articles, but simply exercised the power given by such Articles. It appears to me that the question submitted for the opinion of the Court must be answered in the negative, and the judgment entered for the plaintiffs. The case rests entirely upon the construction of sections 8 and 12 of the Act. It is admitted that the Company has been duly registered, and the provisions of section 8 complied with. Then section 12 gives power to alter the conditions of the Memorandum of Association as to capital of a Company authorized by its Articles to do it. The intention is not to amend the original document, but to modify its conditions. The plaintiffs' Company has, under clause 11 of its Articles of Association, the requisite authority mentioned in section 12 of the Act, and in my opinion comes expressly within the section. The power has been rightly exercised, and the capital properly increased.

*Question answered in the negative in favour
of the plaintiffs, with costs.*

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

3, 4, 7, AND 24 SEPTEMBER, 1874.

IN THE MATTER OF THE ASSIGNED ESTATE OF PHILIP LEVI AND CO.
EX PARTE SARAH LEVI.*DIVISION VI. OF INSOLVENT ACT, 1860—Execution by Attorney—Proof of Debt—Trustee—Interest—Statute of Limitations—Payment on account.*

In 1856 A, a merchant who had for some time previously carried on an extensive business, admitted as co-partners his two brothers and B, till then a clerk in his employ.

No new capital was introduced at the creation of the co-partnership, no balance struck, nor was anything done to enable the new firm to estimate the assets or liabilities of the old business, but such business continued to be conducted, and the liabilities of the old and new firms were from time to time indiscriminately discharged as if no change had occurred, and their course of dealing throughout appeared to assume that the new firm had adopted both the assets and the liabilities of the old.

A, as trustee for his mother, before the formation of the new firm, had collected on her account large sums of money, some of which appeared in the books as credited to her, and others to the properties whence the moneys had arisen, but without reference to A's mother as the owner of such properties. On the establishment of the new firm no alteration whatever was made in the accounts, and the new firm continued to receive money the property of A's mother as before, and to credit it to the same accounts.

Subsequently, and shortly before the making of the assignments herein-after referred to, the bookkeeper of the firm by the direction of A adjusted the account of A's mother, and credited to her the amounts not previously credited.

It was the custom of the firm to allow and to charge their customers interest with annual rests on the balance on current accounts, and in making up this account interest was so allowed. The result was that what previously appeared on the books as a small debit became a very large credit balance.

The apparent debit had been in part created by charging A's mother with moneys drawn by A, small sums only of which were in fact drawn for his mother's use, and with the exception of these small sums no money had been paid to A's mother within the statutory period.

The several members of the firm of A & Co. afterwards executed deeds of assignment pursuant to Division VI. of the Insolvent Act.

 SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

1860, for the benefit of their creditors, one of such deeds being executed by attorney specially appointed for that purpose. A's mother now claimed to rank as a creditor on the joint estate of the firm for the amount actually due to her and in'crest, irrespective of the entries appearing on the books.

Held—1. That a deed executed by an attorney specially appointed for that purpose is duly executed within the meaning of Division VI. of the Insolvent Act, 1860.

2. That by their course of dealing the new firm must be held to have adopted the account, and that A's mother could not be bound by wrongful entries made by A or any other member of the firm without her knowledge or authority.

That the mere fact of A having the entire management of the fund did not divest him of his character of a trustee and convert him into a mere agent, and that the new firm having knowledge of the trusts employed the trust-money, subject to all its incidents, and that lapse of time was no bar to the claim of the cestui que trust against the firm.

That whether the account was considered as an ordinary mercantile one, or the firm was regarded as a trustee improperly using trust funds, A's mother was entitled to interest on the amounts from time to time to her credit with such yearly rests as were usually made in the ordinary course of the business of the firm, and that payments made to her from time to time would be presumed to have been made to her on account of the balance to her credit, so as to remove the same from the operation of the Statute of Limitations.

Semble—That the declaration of a creditor claiming under a deed of assignment made in pursuance of Division VI. of the Insolvent Act, 1860, is prima facie evidence of the truth of the allegations therein contained, and throws the onus of rebutting the same on the persons disputing the claim.

APPEAL from a decision of the Commissioner of Insolvency, in whose judgment, delivered on the 16th June, 1874, the facts and arguments in the Court below were fully stated, as follow :—

In this case a proof of debt was tendered by Mrs. Sarah Levi to the trustees of Messrs. Levi & Co.'s estate in respect of a sum of £13,871 6s. 6d. alleged to be due to her, and which debt the trustees refused to admit, either wholly or in part; whereupon application was made to this Court under Section 181 of the Insolvent Act, 1860, to settle the dispute, both as to Mrs. Levi's right to rank as a creditor and the amount of her debt. Before I consider at length the merits of the proof now tendered, as a

K

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

question of jurisdiction is involved, I propose to treat that first. Prior to September, 1866, Philip Levi, Frederick Levi, Edmund Levi, and Alfred Watts carried on business as merchants in Adelaide and London, Mr. Frederick Levi residing in London and managing the business there. On 17th September, 1866, Philip Levi, Edmund Levi, and Alfred Watts executed a deed of assignment under Division VI. of the Insolvent Act, 1860, to certain trustees for the benefit of their creditors, and on the 23rd day of February, 1867, a similar deed was executed by the attorney of Frederick Levi, specially appointed in that behalf, which was also executed by the trustees. Under these deeds the trustees have acted since their appointment, and have realized a large portion of their estate; have filed their accounts from time to time in the Court of Insolvency, as required by the several Insolvent Acts; and have paid dividends to the creditors of the firm amounting to 20s. in the pound. In this very matter they attending the several sittings of the Court, called evidence to rebut the proof of the creditor, and it is only on the last day of the argument that they raise the objection that, inasmuch as Mr. Frederick Levi was at the time of the execution of the deed of assignment of 23rd February, 1867, out of the jurisdiction of the Court, the deed was not such a deed as came within the provisions of Division VI. of the Insolvent Act, notwithstanding the fact that it would vest in the trustees all the estate and effects of Mr. Frederick Levi. Section 172 of the Insolvent Act requires the deed to be executed by the debtor and trustees within a certain time; but although the trustees do not execute the deed within the seven days, yet the deed is not void until set aside by order of the Court of Insolvency, nor even then unless followed up by an adjudication within seven days of the date of the order (Section 175); and Section 178 enacts that "every such deed which shall purport to be executed by the debtor and trustees respectively, and to be attested as hereinbefore provided, shall be *prima facie* evidence of such signatures and attestations respectively, and no such deed shall, except in manner hereinbefore provided, be liable to be impeached or disturbed either at law or in equity." And Section 179 makes the deed binding on non-assenting creditors "as if they had duly

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

signed the same; and section 180 provides that "all parties to such deed, and all persons bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Insolvency." In this case the trustees and Mrs. Levi as a creditor are parties to the deed, and are therefore subject to the Court of Insolvency. I see nothing in the Insolvent Act which touches the question whether a deed may be executed by a debtor through his attorney; but, according to the well-known maxim "*qui facit per alium facit per se*," I am of opinion that a deed executed by an attorney specially appointed for that purpose is within the meaning of the Insolvent Act. (*Re Bell* 34, L. J. Bank, 36; 13 W. & R., 1,902; Griffith & Holmes, 1,019; *Re Foolcher*, L.R., 1 Chancery, 519.) And in the case of *Lyall v. Jardine*, L.R., 3 Ap., 318, it was expressly held that a deed executed at Hong Kong by one partner resident in England under power of attorney constituted an act of bankruptcy, and was as valid as if the same had been executed by the debtor himself. Now, who is to impeach the deed of Mr. Frederick Levi? Certainly not Frederick Levi himself, for he has specially authorized by deed its execution, and has subsequently by another deed ratified and confirmed the execution of the first deed by his attorney; certainly not the trustees, for they are parties to it, and would not be allowed to take the estate, except subject to the trusts. The creditor now before the Court, Mrs. Levi, not only does not object to the deed, but actually assents to it; and therefore I shall hold that the deed in question is a good and valid deed under the provisions of the Insolvent Act. It purports to be executed by the debtor and trustees, and not having been set aside by the Court of Insolvency cannot now, as I have already pointed out, be impeached at law or in equity (Section 178). But supposing this deed of Frederick Levi's is not under the provisions of the Insolvent Act, then the question arises does that prevent Mrs. Levi's proof being admitted. (Of course I am still only considering the question of jurisdiction.) There is no doubt that the deed executed by Philip Levi, Edmund Levi, and Alfred Watts is quite good and unimpeachable; and therefore I must consider what effect a deed executed by three members of a firm has upon

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

joint creditors. And here I cannot help expressing my surprise that such a point as this should be taken by the trustees, who have paid to all the joint creditors of Philip Levi, Frederick Levi, Edmund Levi, and Alfred Watts dividends amounting to 20s. in the pound, and yet object to the Court considering this claim on the ground that Mrs. Levi is, if anything and as to part of her claim, a joint creditor. But to return. I have already pointed out that creditors' right of proof under deeds of assignment is the same as in insolvency, and by reference to Section 95 it seems to me quite clear that had Philip Levi, Edmund Levi, and Alfred Watts only been adjudicated insolvent, the joint creditors of the firm would have been entitled to prove and to vote in the choice of assignees, and to be heard as to the insolvents' certificate and discharge, "but such creditor shall not receive any dividend out of the *separate* estate of the insolvent until all the *separate* creditors shall have received the full amount of their respective debts," so that under this the creditors' proof could be admitted; and after the separate creditors were paid, as I believe they have been in this case, the joint creditors might participate in the joint estate. And I find a case cited in Shelford, p. 478, *ex parte Wa'erfall*, 4 DeG. & S., 199, where a creditor of a firm of three, two of whom resided in America, recovered judgment against the third alone, who resided in England, and who afterwards became bankrupt, his partners remaining solvent; it was held that the creditor might (notwithstanding the separate judgment) prove against the joint estate. On the whole, therefore, I am of opinion that this Court has jurisdiction to settle the dispute between the creditor and the trustees. On the first hearing of the matter the proof of debt was put in, together with the assent of the creditor and the declaration, and other things required by the Insolvent Acts of 1860 and 1870, together with the deeds of assignment, in which the debt now claimed is admitted to be due by the whole of the partners in the firm of Philip Levi & Co., and this *Mr. Way, Q.C.*, as counsel for the creditor, submitted established a *prima facie* case. After considerable argument I decided that the several provisions contained in Division VI. of the Insolvent Act, 1860, gave to the creditors the same rights and

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

advantages as regards the estate and effects of the debtors as if the debtors had been adjudged insolvent (see Sections 180 and 181), and in the absence of any rule on the subject, therefore, the ordinary practice in insolvency with respect to proof of debts must be followed as nearly as possible in proofs tendered under deeds of assignment. Now the practice of this Court in proofs of debt in insolvency has been for the creditor to file his affidavit verifying the debt, and if no objection is raised thereto by the assignees, the proof is admitted as of course. If it is objected to, then the assignees or persons objecting examine the person tendering the proof, and call such further evidence as appears to them necessary in support of their opposition to the proof, the creditor having the right to call further evidence in support of his proof, and to rebut that produced by the assignees. And so in this case, in the absence of any legislation or rules on the subject, I adopted the ordinary insolvency practice as applicable to the decision of disputes between creditors and trustees, and as being quite in accordance with Sections 180 and 181 of the Insolvent Act of 1860. This preliminary question as to the form and mode of procedure has a larger and more important effect than at first appears, for if the affidavit and declarations made by the creditors are to be taken as *prima facie* evidence of the proof of the debt, the *onus* is cast on the trustees of showing that such affidavit, &c., are incorrect, either wholly or in part, and if the *prima facie* proof is not rebutted, and does not contain matter improbable, and therefore not worthy of credence, the Court must admit the proof so far as the same is not so rebutted or in itself improbable. Having thus disposed of the questions of jurisdiction and form and mode of procedure, I proceed to consider the real and substantial question at issue between the trustees and Mrs. Levi. It is admitted that from the year 1844 until 1856 Mr. Philip Levi acted as agent and trustee for his mother, Mrs. Sarah Levi, received moneys for her from time to time, and made payments to and on her account; that in July, 1856, Mr. Philip Levi took into partnership his brothers Frederick Levi and Edmund Levi, and Mr. Alfred Watts; that the new firm continued to receive the rents and other trust-moneys for Mrs. Levi, and made payments to her and on her

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

account down to the time they suspended payment, and in one instance—in December—1858, transferred to profit and loss old account a sum of £499 1s. 6d. due to Mrs. Levi, and which stood in their books to the credit of an account called “Land and houses private account.” I shall in the first place consider:—1. The amounts (if any) due to Mrs. Levi for principal, and by whom due. Then, 2. Whether Mrs. Levi is entitled to interest. 3. Whether the new firm became responsible for the liabilities of Philip Levi at the commencement of the partnership. 4. Whether the proof should be made by Mrs. Levi or her trustees, Philip and Frederick Levi. 5. Whether the debt or claim mentioned in the proof is barred by the Statute of Limitations. 1. As to the first question. The evidence of the receipt of the moneys from time to time is contained in the books of Philip Levi, and continued in the same books by the new firm after 1856; and by the adjustment of the account by Mr. Eamer (a clerk then in the employ of the firm) under Philip Levi’s instructions that which in the books stood as a debit against Mrs. Levi of £306 13s. 6d. was, by the adjustment, converted into a credit of £11,394 18s. 10d. The important question at issue is not whether the moneys were originally received by Philip Levi, and afterwards by the firm of Philip Levi & Co. (that is admitted), but whether many of the items *debited* by those persons to Mrs. Levi’s account were properly debited. And it seems clear that if an action had been brought by Mrs. Levi against the firm for the moneys so received, the defendants must have pleaded the sum charged and debited to her account as a set-off, and the *onus* would have been thrown on them of showing that Mrs. Levi was liable for the several sums of money alleged to have been paid by the debtors for her and at her request. When the proof first came before the Court, the position taken by the counsel for the trustees was that on the eve of insolvency Philip Levi had, against the expressed desire of his partner, Mr. Alfred Watts, by fraudulent entries in the books of the firm, made Mrs. Levi suddenly appear as a creditor for a large sum, whereas her actual position was as a debtor to the estate of above £300; and on the argument of the case, after all the evidence had been heard, this contention was somewhat modified, and it was conceded that

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

several of the items transferred from Mrs. Levi's account had originally been improperly charged, and to that extent, at any rate the account was properly adjusted. These sums are:—May 9, 1865—By balance, James Harrington, portion of Town Acre 832, £280; Mrs. Phillipson, cash advanced for piano, £60; rates on Section 233 B, paid January, 1859, £1 4s.; rates on land at Port Elliot, £1 10s. 6d.; amount debited in 1861 and 1865, £115—£457 14s. 6d.; so that the total now admitted to have been improperly debited against Mrs. Levi in the books amounts to £457 14s. 6d., not taking into account the question raised whether Mrs. Levi was entitled to receive interest on the yearly balance of moneys due to her. I do not wish to be understood as saying that the serious charge of the books having been altered shortly before the execution of the assignment is not still maintained by the trustees as to the larger portion of the claim; but as I propose to treat on each of the items credited to Mrs. Levi in the adjustment of the account, the result will but show whether the entries were made fraudulently or *bona fide*. The first item in this credit is a sum of £1,872 11s., credited in the books under date December, 1865:—"By Mrs. Phillipson, moneys paid her and on her account from 30th September, 1858, to 16th November, 1865, charged to the latter account now transferred, £1,872 11s." The question to be decided on this part of the proof is "were these moneys paid by the debtors for Mrs. Levi, and at her request." Firstly, there are the entries made in the books of the debtors from time to time of these payments, charging them to Mrs. Levi's account, and the trustees contend that Mr. Philip Levi was the agent of his mother; and if he, whether rightly or wrongly, charged moneys to her account, that would bind her and so release the firm, although if the money were improperly charged, and the entries approved by Mr. Philip Levi, as such agent, Mrs. Levi might have a claim against his private estate in respect thereof. On the other hand, it is contended that Mrs. Levi is not responsible for or bound by the mode in which the debtors kept her account, unless such mode of keeping the same was communicated to her, and that Philip Levi was only the agent and trustee for the receipt of the money, and could only make Mrs. Levi liable for

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

such payments as she authorized or approved. In this view I concur, and shall proceed to consider whether these payments were made to Mrs. Phillipson by Mrs. Levi's authority. It appears that in September, 1858, Mr. Edward Levi agreed to allow his sister, Mrs. Phillipson, a sum of £4 per week, which allowance was continued till 1865, and was for a portion of the time increased by direction of Mr. Philip Levi to £5 per week. The total sum so allowed Mrs. Phillipson, and charged to Mrs. Levi's account, amounted to £1,872 11s. How these payments came originally to be debited to Mrs. Levi's account does not appear. Mr. Eamer says he presumes he "must have had instructions to debit them to Mrs. Levi's account or he should not have done it," but from whom there is no evidence to show. Clearly not from Mrs. Levi or Mr. Philip Levi, for when the advances were made they were in England, where they remained the first two years, or thereabouts, during which the advances were continued; and Mrs. Levi says:—"I did not know of the advances at the time made to Mrs. Phillipson; I only heard of them; they were not made on my account." Mrs. Phillipson's evidence also proves that the allowance was made by Mr. Edmund Levi at the time Mrs. Levi and Mr. Philip Levi were in England, and when Mr. Philip Levi returned it was increased. Eamer says also—"Had no instructions from Mrs. Levi to debit her the money paid to Mrs. Phillipson. Have no recollection what induced me to debit moneys so paid. They were not very particular in the office about Mrs. Levi's account. Remembered once that rents received on her account had not been credited to her. That was some time after the rent account was opened. Did not trouble about it then. It was one of those family accounts which did not affect the business, and therefore it was that they did not trouble so much about it in the office." And Mr. Philip Levi in his evidence says—"I was away when the payments to Mrs. Phillipson began. I never told my mother that she had been charged for the moneys paid to Mrs. Phillipson till the account was made up. I never spoke to her about the account until I had adjusted it." Mr. Watts says—"Mr. Levi told me he was making the allowance to Mrs. Phillipson on account of Mrs. Levi," but he is unable to fix a date; but he says, "I should say

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

it was before Mr. Levi went to England." I think Mr. Watts is quite in error about this, for Mr. Levi did not know of the allowance till long after Edmund Levi had made the arrangement, nor do I think in this and several other places, where there is a conflict of evidence between Mr. Philip Levi and Mr. Watts, that it is evidence against Mrs. Levi, as she was not present at any of the alleged interviews. From these extracts and a careful perusal of all the evidence, I am of opinion that none of the payments made by the debtors to Mrs. Phillipson, and charged to Mrs. Levi's account, were made with the authority or under Mrs. Levi's directions, and that she never ratified or confirmed any such payments, and therefore, subject of course to the question of the Statute of Limitations, which I will treat lastly, I am of opinion that Mrs. Levi is entitled to prove against the joint estate of the debtors in respect to the sum of £1,872 11s. The next item in dispute is a sum of £499 1s. 6d., "Profit and loss old accounts, rents received on Mrs. N. P. Levi's account written off December, 1858, in error." Originally three accounts were kept by Philip Levi in his books—one called "land and houses private account," another "rents account" and the third "Mrs. N. P. Levi's account"—as accounts in which Mrs. Levi was interested. There was also the "Walker-ville Brewery account," which I shall refer to in considering the portion of the proof in reference thereto. Mrs. N. P. Levi's account began in 1845, and was continued down to the time of the execution of the deed of assignment in 1866, and therein the adjustments, the subject of this enquiry, were entered. The balance of credit to the land and houses private account and rents account was from time to time carried to the credit of the general account of Mrs. N. P. Levi. But I do not think it necessary to follow any of the details of these accounts, inasmuch as it is quite clear that the sum of £499 1s. 6d. was due to Mrs. Levi by Mr. Philip Levi, as a balance for rents received and carried to the credit of the lands and houses private account. This balance appeared year after year in the books of Philip Levi, up to the time of the partnership, and two years after that (in 1858) was transferred to profit and loss old account by the firm. The trustees contend that the rents account and Mrs. N. P. Levi's account are substantially

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

one, and that this balance is therefore included in the general account kept with the knowledge of her agent, Philip Levi, and which before the adjustment showed a debit against her of £306 13s. 6d. I think the two accounts are substantially one, and having before disposed of the question of agency, consider that Mrs. Levi is entitled to rank as a creditor for the balance due to her on the whole account, and that she is not bound by an incorrect statement contained in the debtors' books. But this balance of £499 1s. 6d. was a balance on the rents account due from Philip Levi before the partnership, and therefore I must consider whether the liability to pay that was transferred to and accepted by the new firm, or whether the new firm did any act by which all its members were made liable for the same; and as some other portions of the proof are affected by this question it will be necessary to consider the terms of the partnership, and the circumstances under which Mr. Watts joined Mr. Levi. The agreement between Mr. Watts and Mr. Levi was produced, from which it appeared he (Watts) was to become a partner in what may be termed the mercantile portion of the business, and to receive one-tenth of the profits from that source. Nothing was said in the evidence as to the share Frederick and Edmund Levi were to receive, and it appears from the agreement and the books of the firm that Mr. Watts did not put any capital into the business. And this affords a material element in considering whether Mr. Levi accepted a share of all the liabilities he then had. At the time of the partnership there is no doubt Philip Levi was doing a large and profitable business, and had a large capital invested in it, and in station properties greatly in excess of his liabilities, and his net profits averaged about £35,000 per year and in good years as much as £50,000. The new firm carried on the business without any alteration in the books which Philip Levi had kept, except that an account was opened to show Mr. Watts's share of the profits. In all other respects the business was conducted by the new firm, and the customers' accounts continued in exactly the same way as before, and the debts due before the partnership were paid by the new firm as they became due, and at least one account was adjusted long afterwards, and interest

allowed from a date several years prior to the partnership. And Mr. Levi says:—"There were other accounts balanced yearly on which interest was to be charged, and not charged, and I do not recollect giving instructions to correct those. I do not recollect that there were any at that time. Charles Campbell's account was balanced yearly, and interest not charged. There were other accounts, but do not recollect their names." Seeing, therefore, that on the creation of the partnership no new capital was introduced, no change made either in the keeping of the books or the management of the business, no balance struck with a view to estimating existing liabilities, no stocktaking to fix the assets, but that the debts and liabilities of the old business were from time to time discharged as of course by the new firm, I am of opinion that the new firm became responsible and intended to become responsible for all the actual liabilities of Philip Levi at the commencement of the partnership. And as regards this particular sum of £499 1s. 6d., and another sum of £115 admitted to be due by the trustees, Mr. Watts must have actually known of them, for he says:—"The £499 and £115 are sums that were written off to profit and loss, because Mrs. Levi had received money in excess." The next item in dispute is £1,747 15s. 4d., and is entered in the adjustment of the account, "Amount charged her account and paid by her—Account, house expenses, £2,144 5s. 3d.—less in her private account, £490, less charged, £93 10s. 1d., £396 9s. 11d.—£1,747 15s. 4d." This is composed of various items debited to Mrs. Levi in the books of the firm, partly payments on her own account, but principally cheques given to her. The account of the transaction both by Mrs. Levi and Mr. Philip Levi is substantially that so far as the cheques are concerned they were given on account of the housekeeping of Mr. Philip Levi's establishment, for which he was liable, but that Mrs. Levi was accustomed to use as much of them as she required for her own use in the purchase of articles of clothing, &c. The amount thus used is estimated by Mr. P. Levi at £20, but by Mrs. Levi as probably £40 per annum. I see no reason to doubt the truth of this evidence, and therefore *prima facie* Mrs. Levi would be entitled to rank upon the estate as a creditor for the balance whatever it might be. But it is contended

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

that Mr. Philip Levi being the agent of his mother, she is bound between herself and the firm by any entries he might make in the books, and only has a remedy, if at all, against him individually; but it is impossible to accept the conclusion that an agent can debit his principal with money paid previously to his (the agent's) own use; or that the principal is bound by entries of such moneys to his debit, made without his knowledge, and never communicated to him. And in this case it must be remembered that the mode of dealing had been the same when the business was that of Mr. Philip Levi alone. It appears that from the beginning whenever Mrs. Levi wanted money for housekeeping purposes she obtained a cheque from him, and that these cheques were debited to her in his books without her being aware that this was done. Mrs. Levi, therefore, after the new firm had been formed, did no more than she had been in the habit of doing up to that time. And if she would not be bound by entries made in the books of Mr. Philip Levi debiting her with those cheques, so I apprehend she would not be by similar entries made in the books of the firm. There may have been carelessness on her part in not having demanded an account; but it was the duty of the firm to render such account, so that she cannot, I think, be made responsible for any apparent acquiescence owing to their neglect of this duty. And if it may be said that the acts of Philip Levi are the acts of Mrs. Levi, so it may be said that the knowledge of Mr. Philip Levi, as partner, was the knowledge of the firm, and that the clerk by whom the entries were made was the servant, not of Philip Levi specially, but of the firm, whose instructions he must be presumed to have followed. In the earlier years I have no doubt £20 per annum would have quite covered the money used by Mrs. Levi for her own use, and increased in the later years to probably about £40 per year; but as Mrs. Levi herself has estimated the amount generally at £40 I feel bound to fix that amount as the sum used or appropriated for her own use out of the money received. The portion of the claim will be admitted subject to a further reduction of £20 per year, and a proportionate reduction from the general item for interest, calculated with annual rests, which reduction I find altogether amounts to £1,341 0s. 6d. I now come to the sum

of £1,397 1s. 11d. This sum was first debited to Mrs. Levi's account by the firm in July, 1859, and represents the expense incurred in going to, staying, and returning from England. The items of this claim Mr. Eamer states were obtained from the account current received from England, although on his referring to those accounts one sum of £448 11s. 5d. and another of £117 5s. 9d. were not included, nor was any other information given as to those sums. In Mrs. Levi's account the £448 11s. 5d. is charged "one-third house expenses to 31st December, 1858," and the £117 5s. 9d. is charged in the same account as "cash advanced her in London." These debits were entered by Mr. Eamer at the time both Mr. Philip Levi and his mother were in London; but it does not appear by whose instructions. It appears from the evidence of Mr. Philip Levi, Mrs. Levi, and Mr. Phillipson, that in 1857 Mr. Philip Levi invited his mother to accompany him to England, he agreeing to pay all expenses, which after some persuasion she agreed to do. Mrs. Levi had no knowledge of the fact that portion of the expenses had been charged to her account until informed by Mr. Philip Levi about the time the account was adjusted; and if Mr. Philip Levi agreed, as I believe and find he did, to pay those expenses, then Mrs. Levi's account ought not to have been charged, but the whole amount should have been debited to Mr. Philip Levi's own account; and as to portions of these expenses I may remark, as confirming the facts deposed to, that this appears by Mr. Philip Levi's evidence to have been done at first. He says—"In Ledger M, p. 191, the travelling expenses, £655, were charged at first to 'profit and loss old account, Philip Levi;' and were then transferred, half to Mrs. Levi, and half to profit and loss new account." This latter account was kept to show the profit and loss in respect of that part of the business in which Mr. Watts had an interest, and to show his share of the profit. From this account Mr. Watts's share of the profit was deducted, and the balance was carried to the credit of "profit and loss old account," which really was Mr. Philip Levi's account, and in which Mr. Watts had no interest. To this old account Mr. Levi's expenses to England were originally charged, and, as I have already stated, I am of opinion the other partners of the firm of

the clerks were not justified in debiting Mrs. Levi's account with any portion of those expenses. It is contended on the part of the trustees that as the account was debited by the firm with the knowledge of Mrs. Levi's agent, Mr. Philip Levi, she cannot now turn round and say the account was not properly debited with those expenses. In this view I cannot concur, for it seems to me Mr. Philip Levi was not in any way authorized to charge his mother with any part of the expenses, nor did Mrs. Levi herself know that her account had been debited with them until 1866, and but for the fact of the relationship between Mr. Philip Levi and Mrs. Levi, I do not think such a point would for a moment be urged; and although no doubt in cases of Insolvency all transactions between relatives are looked upon with some suspicion and therefore require most close and rigid examination, and all the facts relating thereto to be carefully weighed and considered, yet after that, if the evidence satisfies the Court of the justness of the claim, mere suspicion must be cast on one side, and the relative granted such relief as the Court considers him entitled to. In the present instance both the evidence and the probabilities are in favour of Mrs. Levi's contention, even if no express agreement had been alleged as to the manner in which the expenses of the trip were to be defrayed. Mrs. Levi would naturally assume, and was justified in assuming, that such expenses had been borne by her son in the same manner that the house expenses had been borne by him, more especially seeing that the voyage was undertaken by her at Mr. Philip Levi's invitation and in compliance with his persuasion. On every ground, therefore, I am of opinion that this amount of £1,397 ls. 11d. was improperly debited by the firm to Mrs. Levi's account, and is provable against the joint estate. There is a sum of £371 14s. 5d. credited in the adjusted account for "interest charged her account in error," and the evidence adduced by the trustees (if any on this point) is very meagre, in fact gives no information on the subject. Mr. P. Levi says "the interest charged in error, £371 14s. 5d., to Mrs. Levi's account began in 1845, and went up to January, 1856." That is all I can find on the subject. This item appears almost to have escaped notice, but it is suggested it was interest on the £800 mentioned in the deed of settlement,

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

and that Mrs. Levi's account ought to be debited with both principal and interest. I have endeavoured to trace this out in the books, and find there is in 1850 charged to her account two sums, one in September of £554 12s. 11d. remitted to Sydney, and the other in November of £251 1s. 9d., making together £805 14s. 8d., including interest; and there is no evidence to show either a liability for or authority to pay any other sums of about that amount than the £800 and interest under the settlement of the trust property. I have also examined the trust-deed, which recites a debt of £800 due to Mr. Boyd, of Sydney, and a request by Mrs. Levi that Mr. Philip Levi would pay that amount, and shortly after this the £544 12s. 11d. was remitted to Sydney—probably to Philip Levi's agent, who paid the balance, which no doubt was remitted shortly after, and is represented by the sum of £256 1s. 6d. debited to Mrs. Levi's account in November following. I am strengthened in this view from the fact that no other debit was made against Mrs. Levi's account of the principal sum of £800, and whatever may be said as to the correctness or rather incorrectness of Mr. Philip Levi and the firm's books as to Mrs. Levi's account the errors were always in *their* favour; and I have no doubt, looking at their readiness to debit the account, that had a second £800 been paid for Mrs. Levi, it would soon have gone to her debit. The items of interest extend over about two years, and I do not consider they were properly charged to Mrs. Levi's account. I have no doubt that the £800 mentioned in the deed of settlement was paid off at the time the £805 is debited, and as that sum was therefore taken into the general account, on which, I presume, in the adjusted account interest was charged or debited according to the state of the annual balance, there clearly would be no authority to Philip Levi, or liability on Mrs. Levi's part, to pay special sums for interest on the £800. The effect of the mode adopted in this instance is to make Mrs. Levi pay interest twice over on that sum. 2. I now come to the second question, and have to consider that which, at any rate, as regards the amount involved, is the most important question raised in the enquiry—I refer to the question of interest. In arriving at a decision on this point I shall have to enquire, in the first place—

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

Whether there was any agreement on the subject between the debtors and Mrs. Levi; and in the next place—Whether, in the absence of an express agreement, there were any circumstances which would entitle Mrs. Levi to claim interest. On the first point there is the evidence of Mr. Philip Levi that “in 1850, when she signed the last deed, there was a verbal arrangement between my mother, my brother Frederick, and myself that Mrs. Levi was to have interest for all moneys of hers in our hands, and she was to pay interest if there was a balance against her. Frederick Levi and I were to pay the interest, I suppose. I cannot recollect. The conversation took place at South Terrace. Mrs. Levi, as I have said, was to pay the interest if the balance was against her. The interest was to begin from the commencement of the account in 1844. Although this arrangement was made in 1850, no entry of interest was made in the books until I gave instructions for so doing in 1865.” Then there is the letter written by Mr. Philip Levi to his mother on 24th December, 1863, with reference to his guaranteeing to pay Mrs. Levi the money received by Mr. Goldsmid, in which he specially agrees to pay interest at 8 per cent.; and in Mr. Frederick Levi’s letter of 26th May, 1866, upon which a good deal of stress has been laid by both sides on the argument, these words occur—“In my last letter, under date 26th April, I informed you of the unsatisfactory state of things on this side, and also advised you to settle all property you possibly could on mamma, and, at any rate, to make her covered for the amount due her for *interest*, and *sales of land*, and collection of *rents* on her account. . . . My own opinion is to realize and pay off all liabilities and stick to the residue, whatever it may be. If we could only retain Gum Creek, the wharf, and let all the land, I would go for no more, and which settle so as nothing could interfere with.” Now, whatever opinion may be formed as to this letter, and as to the suggestion to protect Mrs. Levi by settling property on her to secure her debt, it is quite clear that nothing was settled on her, and that had Mr. Philip Levi wished to have paid off his mother’s debt, he had ample funds at his disposal in the Bank to have enabled him to have paid a great deal more than is now claimed; but I do not wish to go

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

into collateral matters, or express any opinion either on this or on the conflict of evidence between Mr. Philip Levi and Mr. Alfred Watts, except where it is absolutely necessary to the matter I have to decide, and so I have only referred to Mr. Frederick Levi's letter as being some evidence on the part of the creditor as showing there were moneys due to Mrs. Levi for *interest, and for sales of land, and collection of rents*; and here, I may remark, I have purposely omitted all reference to Mr. Watts's evidence as to the alterations in the books with regard to Mrs. Levi's account, simply because the real question as to the portions of the claim which I have already considered could be decided without my being forced to decide on the conflicting statements of two gentlemen who have always held, and I think deservedly, so high a position as Messrs. Levi and Watts. But to return to the question of interest. The only evidence I can find given by Mr. Watts on this point is—"Interest had never been charged for a long series of years. I think the interest was charged on the station account. I don't know of any accounts on which interest had not been charged for years. Those accounts subject to interest the bookkeeper would charge in the usual way. . . . I imagine the firm would have allowed interest to a customer if we had the funds in hand." Mrs. Levi in her evidence says—"Am not aware of any arrangement with Mr. Levi as to the terms on which my rents were received. . . . Don't remember my sons saying anything about interest." Then Eamer says—"It was the custom of the firm to make up the accounts annually with interest, debiting or crediting interest according to the state of the account." And Mr. Eamer mentions another family account, that of Mr. Charles Campbell, which had been made up with the books without interest, and on complaints being made this account was adjusted from 1851 to 1859 by the firm allowing interest, calculated back several years before the partnership. And now, what are the probabilities as to interest having been agreed? Firstly, there is the fact that it was the custom to charge or allow interest on all customers' accounts from year to year, according to the state of each account. Secondly, there is the oath of Mr. Philip Levi that he and Frederick Levi specially agreed to do so. Third, there is Philip Levi's letter of

L

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

24th December, 1863, in which he agrees to pay interest on the moneys received by Mr. Goldsmid; and this shows that at that time interest was in the contemplation of both parties, and that in money matters Mrs. Levi was looking after her own interests. Fourth, there is Mr. Frederick Levi's letter, in which he mentions interest. Opposed to this there is Mrs. Levi's evidence that she does not remember anything being said about interest; and I attach very little weight to that, because it can hardly be supposed that an old lady like Mrs. Levi could recollect a conversation which had taken place twenty-four years ago. Then there is the fact that no entries were made in the books as to interest till 1865, and although the mode in which Mr. Philip Levi kept his mother's account must of necessity weaken his evidence, still it cannot bind Mrs. Levi and ought not to prejudice her claim. In the case of *Ex parte Boler*, 1 Mont., D. & D., 602, it was held that entries in the bankrupt's books could not be taken to countervail the oath of the creditor, and a proof which had been expunged on that ground was ordered to be restored. After a careful consideration and perusal of all the evidence, I am satisfied that there was an agreement to pay interest according to the state of the account at the annual balance, and that the firm continued the account in the same way that Mr. Philip Levi had, and that its members knew this, like other accounts with the firm, carried interest. But, independently of any express agreement, the law is clear that where trust-moneys are employed by a person holding a fiduciary relationship which his principal, and by the agent or trustee used in his business, he is liable to pay interest thereon, and where Courts of Equity presume that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, the Court directs rest to be made—(*Burdick v. Garrick*, L.R., 5 Chancery Appeals, 234.) Here the money was trust-money used by the debtors in their business—a business in which it was their custom to make yearly balances of their customers' accounts and to charge or allow interest thereon—and so under either aspect, whether there was an agreement or not, I am of opinion that Mrs. Levi was entitled to interest with

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

yearly rests on the annual balance of the account. The next portion of the claim is for £1,375 19s. 5d., being rents and interest of the Walkerville Brewery; and I may remark that this formed no portion of the accounts adjusted by Mr. Levi's orders in 1866. Messrs. Philip and Frederick Levi are the trustees of the Walkerville Brewery and other properties for the benefit of Mrs. Levi; and Philip Levi, and afterwards the firm, kept an account in their books called the Walkerville Brewery account. All the other rents received from the brewery had been carried to Mrs. Levi's credit in the "rents account," except those mentioned in Schedule B of the proof of debt. In the books the Walkerville Brewery account was closed in January, 1865, with a debit balance of £864 10s. 5d. The origin of this account was that Mr. Edmund Levi, in 1853, took the management of the brewery, and received supplies of malt, sugar, hops, &c., from Philip Levi, repaying him out of the proceeds of the brewery. The account was closed on 31st December, 1864, with a debit balance of £864 10s. 5d., which balance was on 1st January, 1865, brought forward into a new ledger. Mr. Edmund Levi gave up the brewery about February, 1854, when the brewery was let to Whyte & Phillips, and all the rents received in respect thereof after that time were carried to the credit of the brewery account. It was not suggested that Mrs. Levi was responsible for the loss made by Mr. Edmund Levi in the brewery business, nor is it disputed that Mrs. Levi was as *cestui que* trust entitled to the rent received. And the books show the actual receipts for such rent were as stated in the Schedule B of the proof, excepting the interest, which, as in other portions of the claim, is not entered in the books. The trustees contend that the firm did not know of the trusts or that Mrs. Levi was interested in this account; and that they were not liable, at any rate except for the amount received since the partnership in July, 1856. On the other hand it is contended that the firm accepted Mrs. Levi as their client or customer, and did not know they were receiving trust-moneys on her account, and that the firm adopted this account. The rents received, therefore, were portion of the liabilities of Philip Levi at the creation of the partnership, and as such were, in accordance

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

with the view I have before expressed, impliedly accepted by the new firm, without reference to the state of the account appearing in the books. I am of opinion, therefore, that the rents received both before and after the partnership in respect of the Walkerville Brewery are provable against the joint estate; and that Mr. Levi on this also is entitled to receive interest at £10 per cent. on the annual balance. I omitted to mention that I find that the firm of Philip Levi & Co. knew that these rents were portion of Mrs. Levi's trust estate. I come next to the claim of £266 19s. 7d. for dividends alleged to have been received on stock in funds, with interest added. Mr. Goldsmid, of London, was trustee of Mrs. Levi in respect of certain stock in funds, and Mr. Philip Levi by his letter of 24th December, 1863, "guaranteed the payment of the amount received by Mr. Goldsmid," with interest at £8 per cent. This clearly is not a debt due by the firm, and therefore cannot be admitted against the joint estate, nor does the evidence satisfy me that Mr. Philip Levi is liable under the guarantee, as there is nothing to show that the dividends were unreceived by Mr. Goldsmid, which was the condition on which Mr. Levi's liability depended, and therefore this portion of the proof is rejected. 4. I have now to consider the fourth question—whether Mrs. Levi, the *cestui que* trust, can herself prove the debt with regard to the portions of the proof which I consider due, or whether the proof should be by her trustees, Philip and Frederick Levi; and I am of opinion that Mrs. Levi can prove the debt. As regards the whole of the receipts carried to Mrs. Levi's general accounts, there has been an appropriation by the debtors of those moneys to Mrs. Levi's use, and payments made to her from time to time on account; and as the Court of Insolvency has both a legal and equitable jurisdiction, and as Mrs. Levi could take proceedings in Equity against her trustees to account for the trust estate, so I think she may prove in insolvency for the proceeds thereof remaining in the hands of the debtors. (Shelford, Griffiths, & Holmes, 477; *ex parte Heaton re Moxon*, Buck, 386; *ex parte Woodward re Turner*, 2 Dea., 401; Darby & Bosanquet.) And I find it laid down in Deacon on Bankruptcy that "where the bankrupt has been guilty of breach of trust the Court will not

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

permit him to prove at all, but will order one of the legatees, or other persons interested in the property, to prove;" and as showing that the trustee *alone* has not the right to prove, in p. 252, Deacon, I find "that where a trustee proves a debt against a bankrupt the *cestui que* trust ought to join in the deposition;" and also in page 252, citing *ex parte Shaw*, 1 G. & J., 161, "when a bankrupt is executor or trustee, and applies to prove against his own estate, proof is not received without a special order, to which is annexed a condition that the dividends received under such proof are not to come into the hands of the bankrupt." 5. The fifth branch of the case refers to the Statute of Limitations, and that is the last point I have to consider, whether the debt, or any portion of it, is barred by the Statute of Limitations; and this depends, firstly, on the question whether there was any part payment in acknowledgment to take it out of the Statute; and, secondly, whether this is a case in which Equity is bound by the statute, or in other words can the debtors being trustees or persons holding a fiduciary position set this up as an answer to the proof. The only acknowledgments are the entries in the books of Philip Levi and Co., and this is not a sufficient acknowledgment communicated to the creditor. (Darby & Bosanquet on Limitations, 58.) Nor do I think the fact that this debt is inserted by all the debtors in the schedule of their debts contained in the deed of assignment sufficient. That may be a fact worthy of consideration on the general question of the claim, and may properly weaken the evidence given by Mr. Watts, but does not affect the question of acknowledgment; firstly, because it is made by the debtors to third parties; and secondly, because not being voluntary, but exacted from the debtor under the requirements of the Insolvent Act, cannot imply any promise to pay. (Darby & Bosanquet, 62 to 66: *ex parte* Topping, 34 L.J., B.K., 51; *Everett v. Robinson*, 28 L.J., Q.B., 23.) It is true there is the admission by Mr. Philip Levi after the adjustment of the account, but I have some doubt whether that is sufficient. Then was there any part payment to take the debt out of the Statute, and I have already, in considering portion of the proof, referred to the moneys paid firstly by Philip Levi, and afterwards

by the firm, to Mrs. Levi, which in my opinion were payments made on account of the general balance due to Mrs. Levi ; in fact the whole of the evidence seems to me to lead to no other conclusion, and Mr. Watts does not say the payments were not made on account of the general balance. From the accounts I find the firm have actually received on Mrs. Levi's account from sales of land and rents a sum of about £4,227 since 1860. Even if the Statute applied, the payments made from year to year must be taken as admissions by the debtors of moneys due to Mrs. Levi on the general account, and I am of opinion that the amount due on such general balances is not barred by the Statute of Limitations, as to my mind it cannot successfully be contended that the debtors can continue to receive moneys over a long series of years, make payments to the creditor from time to time on account thereof, down to within a few months of the execution of the deed of assignment, and that the Statute of Limitations bars the recovery of the amount really due. I do not think, supposing the balance on this account were due from Mrs. Levi to the trustees, that the Statute would have afforded a defence, nor do I think it does now the balance is in favour of the creditor. But still there is another aspect which, in my opinion, is equally fatal to the position taken by the trustees, viz., that Philip and Frederick Levi were trustees of Mrs. Levi, and in that capacity received the moneys in question ; and I think the firm of Philip Levi & Co. are equally liable, because they knew the source from whence the moneys came, and knowing that used the trust-moneys in their business. (*Ex parte Heaton re Moxon*, Buck, 386 ; *Shelford*, 490.) Mr. Watts in his evidence says—"I was aware that small amounts were received by the firm to the credit of Mrs. Levi for rents, &c. I know they were very small amounts. My impression was that altogether it would be £150 a year or more ; that is my impression without examining the books. . . . I know the Messrs. Levi were trustees for their mother in certain properties, and that the rents of those properties were received by the firm. I think in one instance the firm received the purchase-money of some land sold." The witness was asked as to several sums received for purchase of land sold, but not having referred to

the books he could not answer. In the books it is quite clear that large sums were received by the firm from the sale of the trust estate, and credited to Mrs. Levi. If the relation of trustee and *cestui que* trust has been once actually constituted, as it clearly was in this case, so long as it subsists lapse of time has never been allowed to affect the rights of the *cestui que* trust, and when any person is in receipt of money as agent or guardian, or in any other fiduciary capacity for which it is his duty to account to another, so long as the relation of confidence continues to exist between the parties, no lapse of time can bar the right to an account from the commencement of the transactions. Nor will the Statute begin to run when that relation is put an end to; mere lapse of time has never been allowed to protect a trustee in the enjoyment of property of which he obtained possession in the character of trustee. (Darby & Bosanquet on Limitations, and see cases there cited.) And in *ex parte* Watson, 2 Ves. & B., 414, and *Smith v. Jameson*, 5 T.R., 601, it was decided that where one of several partners applies *trust-money, with the privity of the other partners*, to partnership purposes, the debt may be proved against the *joint estate*, or the separate estate of the party making the misapplication; and in *Marsh v. Keating*, 1 Bing., N.C., 198, *ex parte* Bolland 1 Mont., A., 570, it was held, "even where the other partners were ignorant of the transaction, but with common diligence could have known it:" and in *ex parte* Ward, 2 Rise., 413, "persons receiving trust property from a trustee in breach of his trust become themselves trustees if they have notice of the trust." (Shelford, 489 and 490.) Here the *firm* knew they were not trustees, but yet received the trust-moneys, and used them in their business. And in the case of *Burdick v. Garrick*, L.R., 5 Ch. App. 233, decided in 1870, the question as to the Statute of Limitations where a fiduciary relation exists is fully considered, and numerous cases cited. In that case, an agent, who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power, and paid them into his own bankers to the general account of his firm. The principal died in 1859, and his widow administered, and in 1865

filed a bill against the agent for an account, and the defendants there contended that they were agents and not trustees. They had power to invest money which might come to their hands, but no trust arose until they had actually invested it, and that it was a case of mere legal demand which was barred by the Statute of Limitations, so that the facts of that case were very similar to the present; and it was decided by Lord Chancellor Lord HATHERLEY and by Sir G. M. GIFFARD, L.J., that an agent who stands in a fiduciary relation cannot set up the Statute of Limitations in bar of a suit for an account by his principal. Lord HATHERLEY, after considering the merits of the case, says:—"In the early cases cited by Mr. Hanson in his very able argument, a simple appointment of an agent with confidence reposed in him seems to have been held sufficient by this Court to prevent the Statute of Limitations taking effect;" and after illustrating the case of a person who is going away for a number of years, and leaves chattels with his bankers, and the bankers convert those chattels to their own use, he said it would indeed be strange that after seven or eight years the owner should return and find himself remediless, because the dealing with his property has been in the nature of agency. And in another part he says—"But in the present case we have an agent who is entrusted with these funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock, and *which money* the factor or agent is *bound to keep totally distinct and separate from his own money*, and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case." And in another part of the judgment he says—"But in all cases where the bill is filed against the agent on the grounds of his being in a fiduciary relation, I think it would be right to say that the Statute has no application." And Lord Justice GIFFARD in the same case says—"Under no circumstances could the money be called theirs; under no circumstances had they the least right to apply the money to their own use, or to keep

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

it otherwise than in a distinct and separate account." And again — "And I do not hesitate to say that where the duty of persons is to receive property and hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time." I am therefore of opinion that the Statute of Limitations affords no answer to this proof. I have not thought it necessary to check any of the calculations as to interest charged on the adjusted account, and in the absence of any evidence, or even a suggestion to the contrary, I have assumed that the interest is correctly calculated; and in settling the amount credited for house expenses I have debited Mrs. Levi's account at the rate of £40 per annum instead of £20, and have had interest calculated on the extra £20 per year from the commencement of the account to the date of the deed, with yearly rests. This amounts to £1,341 0s. 6d. Having rejected the portion of the proof for the dividends on the stock, amounting to £266 19s. 7d., I have deducted this and the £1,341 0s. 6d. from the total proof of debt of £13,871 16s. 6d., leaving a balance due to Mrs. Levi of £12,263 6s. 5d. The order of the Court is that Mrs. Sarah Levi rank as a creditor on the joint estate of Philip Levi, Frederick Levi, Edmund Levi, and Alfred Watts, for the said sum of £12,263 6s. 5d."

Stow, Q.C., for the appellant.—Both the law and the fact have been brought before the Supreme Court for their decision. The first point is whether a deed purporting to be executed and signed under Division VI. of the Insolvency Act, 1860, in pursuance of power of attorney, operates to bring the debtor, the trustees, and the creditors under the jurisdiction of the Court of Insolvency, admitting that in all respects except as to signature, the deed was a valid one. The Commissioner appears only to have looked at the question whether the estate of the debtor passed to the trustees, and whether they have distributed it; but the real point is whether the deed has been so executed as to bring the debtor within the jurisdiction of the Court of Insolvency. The point arises under clause 172 of Division VI. of the Act of 1860. The

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

Commissioner has assumed that if a deed were executed by a debtor, but did not purport to be also executed by the trustees within the seven days prescribed by the Act, that it would be valid. The language of the Act, however, is clearly opposed to such an assumption, as will be seen on reference to the language of clause 175 of the Act. There the use of the expression "really executed by each trustee" evidently recognises the likelihood of deeds being made which had not been "really" signed by the trustees in manner prescribed by the Act. The whole tenor of the Statute, however, points to the debtor personally executing the assignment. With reference to the authorities relied on by the Commissioner in the Court below in support of his decision that the deed executed under the power of attorney is a good one, it will be seen on consideration that they do not touch the point raised by the appellants.

Re Bell, 2 D. J. & S., 672,

decided that the execution of the power of attorney under which the deed was signed was also to be executed in conformity with the provisions of the bankruptcy law regulating the signing of the deed itself. The English Bankruptcy Act is analogous to the local Statute of 1860 in its provisions as to the execution of deeds of assignment. The next case is

Re Fulcher, L.R., 1 Ch. 519,

which reversed the bill as to the necessity of the power of attorney being executed in a particular way. Both of the cases, however, were *ex parte*; neither of them raised the real question raised by the appellants. Then in

Lyall v. Jardine, L.N. 3, P.C. App., 318

the judgment simply was that a petition which by the law of Hongkong constituted an act of bankruptcy might be presented under a power of attorney. But in none of the cases was the power of the person to execute the deeds questioned. The

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

decisions all had reference to the manner of execution. (GWYNNE, J.—Have you considered the point of estoppel, *Mr. Stow*? Are not the trustees, who have seized the estate and distributed it estopped from denying the validity of this deed?) I do not contend that the deed is inoperative. The question of estoppel does not arise, as there can be no doubt that, irrespective of the Insolvent Act, a person can assign his estate to trustees, but if the assignment be a statutory one, then all parties will be under the control of the Insolvency Act. (WEARING, J.—I understand the petitioner to contend that the trustees have recognised the jurisdiction of the Insolvency Court by filing accounts in respect of the deeds of assignment.) Such an act would not operate to give a jurisdiction not previously existing. If it had been done under an ordinary conveyance at Common Law, it would not have given the Court a jurisdiction over the parties. (HANSON, C.J.—So far as the case has gone, I feel disposed to consider that the maxim, "*Qui facit per alium facit per se*" touches the point as to the execution of the deed.) (GWYNNE, J.—I am very much disposed to think that what all parties intended was that the deed should operate under the Insolvent Act. If not, it seems to me that it could have no Common Law effect.) The deed contained express words of conveyance. (GWYNNE, J.—I conceive that such language was only used in contemplation of the debtor having the advantages which could only be secured to him under the Insolvent Act.) I concede that it is open to argument whether, if the deed were not good under the Insolvent Act, the trustees would have any Common Law right to administer the estate. Another case referred to was

Ex parte Waterfull, 4 De G. & S., 199,

but that only decided that where three members of a firm became insolvent the assignees took the property, there being an order to keep distinct accounts, and a creditor who had a judgment against the fourth and solvent member of the firm could prove against the estate. Another point of great importance as to the administration of insolvency law has also arisen in the Court below. That is whether a creditor can, by merely making a proof of debt, throw

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

the burden of showing that it was untenable on the assignees of the insolvent.

Way, Q.C.—That point is not one of those on which the trustees have appealed.

Stow, Q.C.—The appeal is on all the law and fact.

Way, Q.C.—The Insolvent Court has decided that under certain circumstances the *onus* is on the trustees to show that the debt proved was not due, and that decision is mentioned in the grounds of appeal as one which the trustees objected to.

Stow, Q.C.—The point has arisen in considering the effect of evidence, and therefore I have a right to refer to it. (GWYNNE, J.—Would it not be analogous to the case of the proof of a will in common form and proof in solemn form? I have never heard that there is any difference as to where the *onus* lies in both those cases.) I submit that the *onus* is on the person claiming. In England, where a proof is not challenged it is admitted as a matter of course, but if it is challenged then the debt has to be established in the regular way as at Common Law. The Commissioner, in the Court below, however, has looked at all the evidence as having been *prima facie* proved, and cast the burden of disproof on the trustees. The appellants, however, take the position that the *onus* is on the petitioner, and that she has not proved her case. It may be said that the greater part of the claim is admitted by the debtor's schedule; but the answer to that is that the entries on the strength of which the debt has been so inserted, were made by Mr. P. Levi, with the knowledge that the firm was on the eve of insolvency, and the act of one debtor of the firm in favour of a particular creditor can have no effect as against the general estate. It is not alleged on the part of the trustees that the entries made by Mr. Levi were false, but that having regard to the peculiar circumstances under which they were made they prove nothing, and cannot be held as binding on the trustees. In that way, and that only, do the appellants impeach the entries. The Court, it is contended, should consider the case as if the entries

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

had never been made. (HANSON, C.J.—The letter of Mr. Frederick Levi in London to Mr. Philip Levi only showed, *prima facie*, a wish not to give Mrs. Levi something which she was not entitled to, but simply to secure her in respect of what she was entitled to.) Gwynne, J.—To give her, in fact, her full legal and equitable rights. It may be read in that way.) It is not necessary for me to put it in any other way, and I do not wish to do so. In any case the entries have been made for the protection of Mrs. Levi, and therefore they cannot be looked at by the Court in a matter, not between Mr. and Mrs. Levi, but between the firm and the general creditors. Reference has been made by the Commissioner in his judgment to the fact of the estate having paid 20s. in the pound. Yet the trustees, who can have no personal interests to serve, consider that they are not justified in paying over the surplus when the creditors have made a claim under clause 171 of the Act of 1860 for interest on their debts. That aspect of the case also touches the question of the validity of Mr. F. Levi's deed, as it would be questionable whether they could make a claim for interest if the deed were only a Common Law one. As to the making of the entries, without going into the question of the veracity of Messrs. Levi and Watts, it certainly is reasonable that the trustees should lay some stress on the fact of Mr. Watts not having at any rate been consulted on the subject. That would strongly operate to destroy the value of the entries as admissions.

Cur. ad. vult.

4 September—

Stow, Q.C., continued—With regard to the question of the *onus* being on the person tendering a proof, the Commissioner quoted the case of

Ex parte Bolland, 1 Mont & A., 570,

in support of his view, but in that case the creditor had not only verified his proof by oath, but had tendered evidence in support of it, and the decision was that the simple production of books was not sufficient to disprove the oath and evidence of the creditor.

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

Returning again to the subject of Mr. F. Levi's letter, at first I adopted the suggestion made by the Court at an earlier stage of the argument, that it only went to show that the writer wished to protect Mrs. Levi's interest. On further consideration, however, I have come to the conclusion that it goes further than that, inasmuch as it evidenced an intention to make the interests of Mrs. Levi and the firm identical, and protect them in opposition to the general body of the creditors. The whole tenor of the letter showed a desire, in the prospect of insolvency, to save as much as possible. (GWYNNE, J.—In any case the suggestions of the letter have not been acted upon.) (HANSON, C.J.—The intention is that according to the view Mr. F. Levi took he wanted to place his mother in the same position as the general body of the creditors.) I am only showing what was in the mind of the parties when the entries were made in the books in 1866, so as to establish the contention of the appellants that as admissions the entries are valueless. It would certainly have been much more satisfactory if the other letter referred to by Mr. Levi in his evidence had been produced. (HANSON, C.J.—Whatever might be the effect of the letter before the Court as far as Mr. F. Levi was concerned, it could not be taken as prejudicial to Mr. Philip Levi.) Mr. Philip Levi admitted that he was influenced by it. The next point is the position of creditors who had running accounts. The Commissioner held that the production of the books proved the receipt of money by the firm, but was not conclusive as to the entries on the debit side. If, however, the books were to be taken as admissions at all, they must be looked at as a whole, and full effect given to all the entries. Of course any particular item might be disputed. Then as to the assumption by the firm of Mr. P. Levi's liabilities at the time of the partnership. The judgment of the Court on that part of the case was opposed to all principles of law. The true position of the parties was identical with that which would apply to a third party taking upon himself any liability. There was to be an agreement proved, either express or implied, between Mr. P. Levi and his partners, and also an acceptance by the creditor of the firm as debtors. The Court appeared to assume that the simple fact of the partnership loaded

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

the new members of the firm with all pre-existing liabilities, and therefore also admitted them to share in all the profits. But Mr. Watts clearly only took a tenth of the mercantile profits, and the mere carrying on the business with the same books as Mr. P. Levi had used did not operate to create the liability under consideration. If immediately after Mr. Watts joined the firm some large creditor had sued him for a heavy debt, it surely would not be said that the new partner could be compelled to meet the claim, unless he had expressly taken upon himself the liability. The Commissioner referred to one old account which had been adjusted and acted upon by the new firm, but that could not be held to affect all the old accounts. It was said that in respect of the payments made to Mrs. Levi from time to time, both before and after the partnership, it was competent for her to estimate what she actually spent for herself and then debit the remainder to household expenditure. But the appellants submitted that in any case none of such debits were chargeable against the general estate. Mr Philip Levi was throughout the agent for his mother, and even if he applied her moneys improperly, unless it could be shown that the remaining members of the firm had knowledge of it, they could not be affected by such misappropriation. Mrs. Levi had stated distinctly that she had left the whole management of her affairs to her son. Any improper dealing, therefore, with her moneys was a matter purely between herself and Mr. P. Levi. If the latter had chosen to draw out the whole of his mother's money from the firm his co-partners could have no right to gain-say it, but they would have been effectually discharged from any further liability in connection with such money. But the judgment goes further, and renders the firm liable for erroneous entries at the time of the partnership, and also for what ought to have but did not appear in the accounts. But it is quite clear that even if the firm accepted the liabilities appearing in the books, they can be bound by nothing outside of them. The item of the petitioner's claim in respect of the expenses of the trip to England has been governed by the fiduciary relationship between herself and her son and the firm are not liable. And again, the entries debiting Mrs. Levi were the solemn act of Mr. P. Levi, who knew

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

all the circumstances. If he did not intend to charge his mother with the various amounts, what possible explanation could be given of his causing the debits to be made? As to the payments to Mrs. Phillipson, it is true that the first items in the books in respect of them were made when Mr. P. Levi was in England, but on his return to the colony he had expressly recognised their being debited to his mother. With regard to the balance on the "Land and Houses Private Accounts" it was not operated on after 1856, the date of the partnership; and there was nothing to convey to the mind of Mr. Watts that Mrs. Levi had any claim upon it, and the natural impression therefore was that Mr. P. Levi was the only person interested in it. Coming to the question of the claim for £5,679 odd for interest simple and compound, it will be necessary to divide the consideration of it into two epochs—the time preceding and succeeding the partnership. In the first place it is to be observed that the petitioner's account has been kept throughout without any computation of interest. No commission, also, has ever been charged for collecting the rents which form the basis of the claim. It is evident that Mrs. Levi's was regarded as a family account kept for convenience, and quite distinct from the ordinary business ones from which the firm derived a profit. The Commissioner in his judgment has acted upon two distinct and inconsistent propositions—first, that there was an agreement to pay interest; and second, that it was trust money; and the firm must be taken to have known that, and be made to pay interest accordingly. As to the first point, it was not pretended that there was an agreement by Mr. Philip Levi or any one else antecedent to the partnership, and the only evidence of an agreement at all was that of Mr. P. Levi, who swore to a promise he made to his mother to that effect in 1850. But it was singular if interest were chargeable that no commission had been arranged to be paid. In any case, however, such a promise was not binding on the firm. It did not appear by the books, and was never communicated to either of the partners. It has been attempted to put Mrs. Levi's account on the same footing as the other accounts of the firm, but it was clearly distinguishable from the rest as one kept only for the convenience of the creditor. Then

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

as to it being trust-money which the firm had misappropriated. If there had been any misappropriation with the knowledge of all the partners, of course they would all have been liable for the breach of trust; but nothing of the kind has been shown, and even if the other members of the firm accepted Mr. P. Levi's liabilities when they joined him, it cannot be said that they would be prejudiced by his breach of trust. But the petitioner's case all along has been to treat her claim as a Common Law debt. The Commissioner, however, has expanded it into a question of equitable right. But even looking at the case in that light, no breach of trust has been established as against the firm, inasmuch as Mr. P. Levi was the uncontrolled agent of his mother. Then, if he had agreed to pay interest, he was not bound to keep the trust funds separate from other moneys, especially when Mrs. Levi was in the habit of going to the office of the firm and receiving their cheques for her own private purposes. The character of the money was therefore changed to that of an ordinary loan. With regard to Mr. Levi's account being in the same position as Mr. Campbell's, which was another family one, there was the distinction that the latter was of a mercantile character. As to Mr. Levi, also, having expressly agreed in writing to pay interest on certain moneys received, that could not be extended so as to comprehend all funds belonging to Mrs. Levi coming into his hands. If the claim was made against the firm at all, it must be on the ground that they were implied trustees of the trust-moneys—

Ex parte Heaton re Moxon, Buck, 386.

(GWYNNE, J.—If they were liable for interest they would also be amenable to account for the profits made with the trust-moneys). As to the Walkerville Brewery account, it was really, as far as the firm was concerned, one of Mr. P. Levi's. He made the leases and received the rents, and there could not be a charge against the joint estate of the firm in relation to any moneys which he so received which should have been credited to Mrs. Levi. The last point to be considered is that of the Statute

M

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

of Limitations. The proposition of the trustees is that as regards all moneys received six years before the signing of the deed of assignment the claim is not supportable, inasmuch as the application was to obtain the benefit of moneys which were being administered under such deed. The three questions to be considered are — first, whether the moneys were a trust and therefore out of the Statute; second, has there been any acknowledgment of the liability; and third, has there been part payment, which would amount to an acknowledgment. The first question has been previously referred to. The case of

Burdick v Garrick, L R., 5 Ch. App., 233,

shows that where the duty is cast on the agent or trustee to keep the moneys received by him in separate account, then he cannot plead the Statute of Limitations in reference to such moneys; but where the funds are simply held as by a banker the Statute might run. The Commissioner has extended the doctrine to all trusts, but the distinction is the one put in the case cited. The appellants then contend that first Mr. Levi, and certainly the firm did not hold Mrs. Levi's money in such a fiduciary capacity as would bar the Statute. In fact the money was simply held as by an ordinary banker. With reference to an acknowledgment, it is necessary that it should be written or by way of payment, and if the former the writing has to be signed by all the parties to be charged thereby. The signature of an agent is not sufficient—

Darby & Bosanquet on Limitations.

Neither the entries in the books nor in the schedule of the deeds of assignment, therefore, were effectual. As to part payment, in order to be successfully pleaded it would have to be shown that it was made in respect of a particular debt. If a man purports to pay an account in full, but does not do so, that cannot be taken as a part payment within the meaning of the Statute of Limitations. In the case before the Court each receipt of money was a specific debt. The general payment to the creditor, therefore, would not be binding as part payment, and the *onus* of proof lay

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

upon the party setting up the acknowledgment. But the case for the petitioner is that all the moneys received by her, with two exceptions, were not in the nature of payment of her debt, but on account of household expenses. The exceptions referred to are Harrington's acceptance received on account of part of the trust property sold, and Norman's account, which, it appears, had been paid for Mrs. Levi. Set-off, however, is not good as part payment, except under the express sanction of the creditor. The cases on the subject of the Statute of Limitations are numerous—

Tippett v Heane, 4 Tyr. 772

Burn v. Boulton, 15 L.J., C.P. 97 ; 2 C.B., 476

Nash v. Hodgson, 25 L.J., Ch., 186

Whitcomb v. Whiting, 2 Doug., 628.

On all the grounds stated, therefore, it is submitted that the judgment of the Court below should be reversed, and the appeal upheld.

Boucaut on the same side.

Way, Q C., for the respondent.—I do not think it necessary lengthily to go into the question of the signature of Mr. F. Lev; to the deed of assignment having been by attorney. There is no case in support of the contention on behalf of the appellants, all the authorities being expressly against it. (HANSON, C.J.—I don't think you need trouble yourself on that point, *Mr. Way*.) As to the question of the *onus* of proof being on the person making the claim, it will be well to look at the practice of the Insolvency Court and the clauses of the Act of 1860. When a proof is tendered, unless it be disputed, the Court under section 140 of the Act, admits it as a matter of course. When a person makes a deed of assignment he appends a list of his debts, and the creditors named in such list are, under section 80, in the position of persons who have proved. Under the Insolvency Amendment Act of 1870-71, that provision has been amended, a declaration verifying the debt being necessary in all cases. Mrs. Levi, then, being in the schedule of the deed for £11,000, was in the position of

a creditor who had proved for that amount, and the position of the trustees was that of assignees who under clause 159 wished to oppose her proof. As to the balance of the claim, it has been proved in accordance with section 186, by sending particulars of the debt, and making a declaration in reference to it. On the trustees, therefore, is clearly cast the duty of showing why the claims should be rejected. It is notable that the appellants did not very persistently press the point in the Court below. Looking at the merits of the petitioner's claim, there can hardly be a more *bona fide* case brought under the attention of the Court. The liability commenced under certain trust-deeds under a marriage settlement, by virtue of which certain rents had been received, which formed the basis of the claim. Prior to the insolvency there appeared entries in the books of the firm, admitting a liability to the petitioner to the extent of over £11,000. That was *prima facie* evidence of the debt, but it has been sought to attack the *bona fides* of the entries. In the Court below the attack was of a much stronger character than the one made in conducting the appeal; but although milder language has been used, the gravamen of the charge is the same. Either the contention of the trustees amounts to a charge of fraud, or it amounts to nothing. In the first place, it is said the entries were made in contemplation of insolvency, and in consequence of a letter received from Mr. F. Levi in England. There is sworn testimony, however, that Mr. Philip Levi acted in consequence of a previous letter which had been lost. Mr. Eamer, the accountant to the firm, said the entries were made between the months of April and July, 1866, and the letter which was produced was only received in the latter month. A reference to the books also will show that not only Mrs. Levi's, but other accounts were adjusted at the same time, and that hers were taken in the ordinary course. But Mr. Watts said that he objected at the time to the entries with regard to Mrs. Levi's account. Without going further into the question of the contradictory testimony of Messrs. Levi and Watts, it is only necessary to remember that within a few weeks of the alleged objection on his part Mr. Watts solemnly affixed his signature and seal to a deed admitting Mrs. Levi as a creditor of the firm to the

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

extent of £11,000 odd. If that was not correct it was a fraud upon the Insolvency Court. The effect of the entries, also, was simply to place the petitioner in the same position as all the other creditors. The case of

Rolfe and Others v. Flower and Others, L.R., 1 P.C., 27,

was analogous to the one before the Court. But then it is said that Mr. P. Levi was the general agent of his mother, and that the latter was bound by all his acts. Even admitting that, it surely cannot be said that Mrs. Levi is bound by the entries made by Mr. Levi's clerks while he was in England. Yet that is the position of Mrs. Phillipson's account. With regard to the balance on the Lands and Houses private account, it is evident that when the firm was formed in 1856 that appeared as a debt; and if it was subsequently transferred to the credit of Mr. P. Levi in error, surely it might be retransferred to the proper account when the error was discovered. The firm or the general creditors were not prejudiced by it in any case. As to the housekeeping expenses, the evidence shows that the petitioner acted as Mr. Levi's housekeeper, and as such went to Mr. Levi as the head of the establishment for funds to meet the liabilities. With reference to the expenses to England, all the witnesses spoke as to Mrs. Levi having gone simply at the invitation of her brother. But further, the whole cost of the trip was originally debited to Mrs. Levi, and was not transferred till some years afterwards. Mr. Levi stated that he did not recollect giving the instructions for the part of the expenses being debited to his mother, and Mr. Eamer, the accountant, stated that it was done while Mr. Levi was in England. (HANSON, C.J.—It appears that Mrs. Levi's income was about £250 a year. According to the appellant's contention, therefore, she spent three times its amount in one year.)

Cur. ad. vult.

7 September—

Way, Q.C., continued.—Referring to the claim of the petitioner in respect of Walkerville brewery, all the money, with the exception of about £300 received on that account, was paid to the firm

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

of P. Levi & Co., so that the question of the joint or several estate hardly arises in connection with it. But the appellants contend that there was no privity between Mr. P. Levi and other members of the firm with respect to it, inasmuch as the leases were made out in the name of Mr. P. Levi, and there was everything to lead to the conclusion that he only was interested in the brewery. The simple answer is that the firm were liable for all trust-moneys received by them with knowledge of the trust, which they undoubtedly had. It is conceded also at one part of the appellant's case that Mrs. Levi would be entitled to prove for what was actually due to her. Then on the question of interest. It appears by the books of the firm that every customer of the firm was entitled to and did receive interest. It has been suggested that the petitioner's account was a distinctive one, because it differed from the ordinary station and other accounts, as to which a commission was charged. But, in addition to the fact that there were other persons who were not charged a commission when money was simply collected, it is necessary to remember that money was then much dearer than at the present time, and therefore it paid the firm to allow a good rate of interest for money left in their hands for their use. And, again, the brothers Levi were trustees for their mother, and therefore would not be entitled to charge commission. As to Mrs. Levi never having been credited with interest, that is easily to be accounted for. The normal state of the books of the firm was to be in arrear, but when a customer's account was made up the balance of the interest was then duly credited. It was from the fact of the books being so in arrear that all the difficulty in respect to the petitioner's claim had arisen. Proper accounts had originally been opened with Mrs. Levi under proper headings, but on a new bookkeeper taking charge of the books when in arrear, he, not seeing on the face of all the accounts that they were connected with Mrs. Levi, had been led into improperly dealing with them. But the case of the appellants as to interest is fully met by the doctrine that a trustee is not entitled to make a profit out of the trust-moneys in his hands, and if he does so the *cestui que* trust can either follow the moneys and seize the profits, or charge interest with annual rests —

Lemon on Trusts.

Burdick v. Garrick, L.R. 5 Ch., app. 233.

But further, there is evidence of an express agreement to pay interest. The appellants say the firm are not bound by that, even if it were made. But the fact remains that Mr. P. Levi had a large accumulation of money belonging to the petitioner in his hands when the firm was organised, and that money was used generally in the business, and that it having been received with a knowledge of the trust on which it was held bound the firm in respect of it; in fact, it is not necessary to consider the question of the agreement to pay interest. The next point is, did the new firm adopt the debt due by Mr. P. Levi to the petitioner? Of the £13,000 composing the proof, only about £3,000 was received before the time of the firm; and as to that amount, if the Court do not think it was chargeable against the joint estate, inasmuch as the question is not one of forms of action, they will do substantial justice and allow a claim on the separate estate. Under the Insolvent Act such an order can be made (GWYNNE, J.—Could not a proof go against the separate estate of P. Levi for the whole claim?) It certainly might, as Mr. Levi was a trustee. The result would be the same also, as the separate estate of Mr. Levi showed a large surplus. The petitioner, however, had elected to go against the joint assets of the firm, which she had a perfect right to do. Under the old bankruptcy law of England it is necessary when a claim is made on the separate as well as on the joint estate to have a separate and a joint fiat; by the Acts of 1849 the necessity of the double fiat is abolished. (GWYNNE, J.—Is not Mr. Watts only affected to the extent of one-tenth?) Mr. Watt's interest, as far as his separate connection is concerned, is a purely theoretical one. If interest were allowed to the general body of the creditors, the whole of the surplus would be swallowed up; and, if not Mr. Levi, who had started the firm with a capital of about £190,000, would have the first claim on any balance remaining after payment of all claims on the estate. The general rule as to the question of joint and separate liability is that very slight circumstances will suffice to change the debt of an old firm into a liability of the

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

new ; and in order to entitle a creditor to claim on the joint estate is not necessary that the old liability should be entirely discharged, or in other words, that there should be a complete novation. The case for the appellants, also, is that the character of the petitioner's moneys was changed from that of a trust to an ordinary loan. Then that being so, the authorities show that the firm by using the money adopted the liability ; and Mr. Levi therefore, *qua* the mercantile account, would be discharged—

Linley

Ex parte Jackson, 1 Vesey, jun., 131

Roffe and Others v. Flower and Others, L.R., 1 P.C., 127

Ex parte Williams, Buck 13

Ex parte Clowe, 2 Bro. C. C., 595

Harte v. Alexander, 2 M. & W., 484.

Lord ELDON expressed the opinion in Jackson's case that any payment to the creditor would operate to fix the liability upon the new firm. In the case before the Court the appellant's own contention is that the petitioner received cheques signed by the firm. (GWYNNE, J.—You rely upon the fact of Mrs. Levi having received the cheques of the firm as showing her acquiescence in the new firm becoming her creditors instead of Mr. P. Levi alone?) That is the view I contend for. On the probabilities it is absurd to say that the new firm took Mr. P. Levi's large capital without any intention of rendering themselves liable for his liabilities. The presumption as to the joint liability also further supported by the fact of Mr. P. Levi's books being carried on without any balance being struck, or attempt made to show distinctive liabilities. When also Mr. Campbell's and the North-West Bend accounts were made up in 1859 there had been no thought of separating what the firm had to pay as distinct from what was due before the partnership commenced. Again, if the entries in the books were not fraudulent, they will bind the firm. (GWYNNE, J.—And if they were made as genuine corrections it would have been a fraud to have omitted them.) With reference to the letter of Mr. F. Levi, it has been said that it clearly showed an intention to protect the petitioner at the expense of the general creditors. Even

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

admitting that it is clear that Mr. P. Levi did not act upon the suggestions, as, although there was a credit balance at that time of £60,000, he took no steps for securing any portion of that sum for the benefit of his mother. Then it is said that the entries were made under protest from Mr. Watts. That Mr. Levi contradicted, and further, Mr. Watts has ratified the entries by signing a deed acknowledging Mrs. Levi as a large creditor. Recurring to the subject of the firm adopting the liability, it is shown in

Browne v. Gordon, 16 Beav., 302

that the mere continuing the business and making payments of interest would be sufficient to bind a new partnership, and it is not necessary that the former debtor should be expressly discharged—

Linley

Scott v. Beale, 6 Jur., N.S., 559

Harris v. Furwell, 13 Beav., 403

But assuming there was not an agreement to reckon the petitioner's money as a loan, it is quite clear that trust moneys could be followed in bankruptcy—

Ex parte Watson, 2 Ves. & B., 414

Shelford on Bankruptcy

Griffiths & Holmes on Bankruptcy

Ex parte Clowes, 2 Bro. C. C., 595

(GWYNNE, J.—They would be liable under the doctrine of constructive notice, you say?) It went further than a mere constructive notice. Mrs. Levi's accounts were distributed through the books. It is no answer to say that it did not appear that she was interested in more than one of them. The books were open to all the partners, and it was their duty to enquire into anything which they did not fully understand. In

Ex parte Heaton re Moxon, Buck, 386.

which was cited on the part of the appellants to show that a knowledge of the trust is necessary in order to charge third parties, it was proved that there had been no notice whatever; the petitioner, however, clearly established that the firm must have been aware of Mr. P. Levi's fiduciary position. The last point is as to the Statute of Limitations. If the agreement to pay interest were not proved then it is evident that the Statute could not run, as the moneys were held as a trust—

Burdick v. Garrick, L.R., 5 Ch. app.

Darby & Bosanquet on Limitations.

The counsel for the appellants have contended that there was no agreement to pay interest, but yet the character of the money has been changed by some arrangement, which, however, is not very clearly defined. (GWYNNE, J.—If the Statute does not run as to the principal sum it cannot apply to the interest, which is only an accessory.) The argument for the appellants is that the Statute barred everything bearing a date anterior to six years before the execution of the deeds of assignment. According to the contention urged in support of the proposition, also, the petitioner has put herself out of the position of a *cestui que* trust, and for no beneficial reason. On the other branch of the case, if the agreement for interest were admitted, still the Statute would not bar the petitioner's claim, because the firm were bound to make up their books annually, and credit Mrs. Levi with her interest, and thereby a fresh debt would be created. (GWYNNE, J.—Would the fact of the deed of assignment admitting the liability take it out of the Statute?) I think it is doubtful. Irrespective of the Insolvent Act the execution of the deed would, but the object of the assignment under the Act is simply to facilitate the division of the assets. In addition to the question of the books of the firm, there is distinct evidence that the payments made to Mrs. Levi from time to time were on account of the general balance due to her. In the case of work and labour the mere payment of money does not raise the presumption that it was an account, but where there had been an actual advance of cash a payment would justify the inference that it was on account of what was due.

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

Where there are several debts, unless distinct evidence is tendered that a payment is on account of either one or all of them, such payment would not bar the Statute, but it is always competent for a jury to find what is the nature of the payment.

Walker v. Butler, 6 El. & Bl., 506, 25 L.J., Ch. 377

Burn v. Boulton, 15 L.J., C.P. 97 ; 2 C.B. 476

Nash v. Hodgson, 25 L.J., Ch. 186,

which were quoted by the counsel for the appellants, were clearly distinguishable. But further, there have been frequent payments of rates on Mrs. Levi's account, and also the firm paid Norman's account. It has been said that the latter is only to be regarded in the light of a set-off, but that is not so—

Whitcomb v. Whiting, 2 Dougl., 682

Darby & Bosanquet

Worthington v. Grimsditch, 7 Q.B., 479.

If accounts were stated, the entries on the debit side would be evidence of payment, and, adopting the argument on the side of the appellants that Mr. P. Levi was the agent of the petitioner, the correctness of Norman's account being debited has been duly recognised. With reference to the payments made to Mrs. Levi the firm always treated them as payments on account, instead of moneys which were expended partly for Mr. P. Levi and partly for the petitioner personally. The payments of rates, however, were clearly made *qua* agent, and therefore they operated to take the case out of the Statute. On the whole case, then, the petitioner is in the position of a creditor who has proved, and the *onus* is on the appellants. The charge of fraud has entirely failed. The credit side of the account is undisputed; all the other creditors were in the habit of receiving interest; the estate has paid twenty shillings in the pound; and the claim of the petitioner simply is to be placed in the same position as the other creditors. It is confidently submitted that simply because she happens to be a relative of some members of the firm she is not therefore to lose her rights, but the Court should protect her by upholding the judgment of the Court below.

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

J. W. Downer, on the same side.—On the question of the *onus* being on the appellants to upset the proof, in insolvency, except where otherwise provided, all parties are in the same position as under a deed of assignment. By section 140 of the Act of 1860 it is enacted that one way of proving a debt shall be by simply leaving particulars of the claim with the Court verified by an affidavit. But section 159 gives power to the assignees or trustees to dispute such debt. *Prima facie*, therefore, the petitioner by her proof established her case, and no appeal on that point has been made. Under section 180 the execution of a deed of assignment places all parties in a like position to that which they would be in under an adjudication of insolvency, and *prima facie* the insertion of a debt in the schedule makes a person a creditor on the estate. If a debt were not so inserted, however, by section 186 a person is enabled to secure a due recognition of his rights. Mrs. Levi then was both by virtue of the schedule of the deed, and of her subsequent proof, in the position of a creditor who had proved. (GWYNNE, J.—Supposing no evidence had been called to rebut the proof when tendered? I think that is the criterion of where the *onus* lies.) The first objection of the appellants to the claim is that it was a debt by Mr. P. Levi alone, and that the firm were not liable. But Mr. Watts was not asked whether he considered the firm were liable or not, and his evidence as to the item of £499 ls. 6d. being carried to profit and loss, because Mrs. Levi stood to the debit in the books, abundantly shows that Mrs. Levi was recognised as dealing with the firm. That shows also that Mr. Watts knew to whom the sum of £499 belonged, and further, Mrs. Levi's account was brought to a state of debit by starting as a basis on the debit of about £1,000, at which the petitioner's account stood in Mr. P. Levi's books prior to the formation of the firm. And, again it is not on the petitioner to show that the firm did take the liabilities of Mr. P. Levi; but the appellants have to show that they did not, and that has not been done. The case of the appellants, too, has all along been not one of joint or separate liability, but that the entries on which the petitioner based her claim were fraudulent. With regard to the question of interest,

the Commissioner in his judgment has put it either that there was an agreement to pay interest or that the firm held the petitioner's money in trust. On Mr. Watts joining the firm he must have seen certain accounts standing in the books, and in his own evidence as to the transfer of the £499 he must have known Mrs. Levi was interested in others than the ones bearing her name. With a knowledge that the moneys were a trust, therefore, it became his duty, as a prudent man, seeing that such moneys were being used in the business, at least to have enquired into the nature of the fiduciary relations which existed between Mrs. Levi and her son. He must have known either that a breach of trust was being committed, or that the character of the moneys had been changed into that of a loan, and in either case Mrs. Levi would be entitled to interest. The appellants made a strong point of the letter of Mr. P. Levi; but as a matter of fact it tells in the petitioner's favour, as it mentions the very rents and interest in respect of which she claims. It has been ingeniously argued that Mr. P. Levi was both trustee and agent. The only evidence of the latter relationship, however, is the statement of Mrs. Levi that she left the management of everything to her son. As to Mrs. Phillipson's account and the expenses to England, they were both debited to the petitioner when both herself and her so-called agent were in England, and when Mr. Watts was one of the resident managers of the firm. Briefly the petitioner's case is that a *prima facie* claim has been made out, that it is on the appellants to rebut it; but that, so far from doing so, their own evidence supports the petitioner. On the Statute of Limitations it is only necessary to add to the argument of the preceding counsel by quoting the case of—

Cleave v. Jones, 6 Ex., 573.

Stow, Q.C., in reply.—On the question of the adoption of the petitioner's debt by the firm, each receipt of money was a debt. If on entering into a business accounts are presented to a person, and he agrees to become responsible for certain specific debts, and the creditor agrees to accept him as a debtor, then he would undoubtedly be bound, but only to the extent of what appears

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

by the accounts. It cannot be said that simply carrying on the business with the same books, and making general payments, is sufficient to invest the new firm with all the liabilities of its predecessors, with all errors and omissions. No agreement also has been shown as to the acceptance by the creditor of the new firm as her debtors, and until the making of the entries in 1866 there was nothing to show that the liability had been assumed by the new firm. Even admitting that Mr. P. Levi brought the large capital into the business which had been said he did, the firm would not take the whole of it, and if the business had been wound up at a profit Mr. Levi would have been entitled to have his capital repaid him. As to Mr. Watts being only theoretically interested in the surplus, it is only necessary to refute that by calling attention to the fact that that gentleman's private estate has been sacrificed to meet liabilities accruing from branches of the business with which he was in no way connected. With reference to where the *onus* of proof lay, it is to be remembered that there is a distinction where a proof has once been admitted. There is no doubt there would have to be rebutting evidence, but from the first, in the case before the Court, the claim of the petitioner has been resisted, and the creditor brought the matter before the Insolvency Court. As to the entries of 1866 not having been made in consequence of the contents of Mr. F. Levi's letter, at any rate the sworn evidence of Mr. P. Levi is that he acted upon a previously-received letter, and Mr. Watts stated that none of the entries had been made in July, 1866. Referring to the suggestion of fraud, all the appellants wish to establish is that the petitioner's claim should be considered irrespective of them, because their value as admissions is destroyed by the circumstances under which they were made. With regard to the payments to Mrs. Levi, they were evidently made to her by Mr. P. Levi as her agent. She had an income of about £250 a year, and received altogether something like £90 per annum. Without any data, however, to guide the Court, it is now sought to change all the sums so paid to her, and properly debited, into credits, and not only that, but increase the amount by charging twenty-two years' compound interest. On the question of interest, the only

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

point is whether there had been any promise to pay it. If so, and on that the petitioner relies, then it should clearly be at the simple rate only. All the evidence went to show that it was impossible that the firm could have used Mrs. Levi's money for twenty-two years without her knowledge, and that being so there was no breach of trust. As to the Statute of Limitations, it cannot be said that the payments to Mrs. Levi were on account of the general balance, for the case for the petitioner is that they were made on account of Mr. P. Levi's housekeeping expenses. If, however, they were payments to Mrs. Levi, they should be debited against her. As to Mr. Watts having executed the deed of assignment admitting Mrs. Levi as a creditor, it will be seen that when it is suggested to a debtor that a debt is due if he omits to enter it in his schedule he does so at the peril of having his deed upset. That therefore clears the imputation which has been made against the gentleman in question, who would certainly have been advised to act as he has done. Reviewing the whole case, the position of the trustees has been one of great difficulty, especially when the statements of Mr. Watts are before them. (HANSON, C.J.—We think that there can be no question that the trustees were quite justified in bringing the case both before the lower tribunal and this Court.) I am very glad to have that assurance, as the matter is one of great responsibility.

Cur. ad. vult.

24 September—

Judgment was now delivered as follows by HANSON, C.J.:—This case comes before us on appeal from the decision of His Honor the Commissioner of Insolvency allowing the claim of the respondent Sarah Levi to rank as a creditor on the assigned estate of Messrs. P. Levi & Co. The various questions raised, and the facts upon which their decision depends, are so fully stated in the elaborate judgment of His Honor the Commissioner that it is only necessary to refer to them very briefly at present. It is not disputed that the moneys, in respect of which the claim arises, were received by Mr. P. Levi or by the firm, and it was scarcely contended that as against the respondent the various items by

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

which it was sought to reduce her claim had been properly debited to her account, though it was argued that as between herself and the firm of P. Levi & Co. she was bound by the entries made with the sanction of Mr. P. Levi, as her agent. But no authority was cited to show that a trustee by reason of his being allowed to possess the entire management of the trust fund becomes divested of his character as trustee or invested with the character of a mere agent, or that as between the *cestui que* trust and third persons who have express or implied notice of the trust the former would be bound by wrongful entries made by her trustee without her knowledge. And it must be remembered that, with regard to the greater portion of the entries upon which the appellants rely, there is no evidence whatever of any direction by Mr. P. Levi, the trustee, that they should be made. On the contrary the evidence shows that they were made by the bookkeeper of the firm in that capacity and without any special instructions, and in some instances, as in the case of the expenses of the journey to London, under circumstances which show that no direction could have been given by Mr. P. Levi. There appears consequently to be no ground for questioning the propriety of the transfer to the credit of the respondent of the various sums previously placed to her debit, with the exceptions disallowed by the Commissioner. The questions, therefore, which we have to decide are whether the respondent is entitled to prove her debt against the firm of P. Levi & Co., whether she is entitled to interest, and whether the debt, or any part of it is barred by the Statute of Limitations. With regard to the first question, it appears that Mr. P. Levi, who was carrying on an extensive business as a merchant in Adelaide, and who was one of the trustees of the respondent, was in the habit of receiving and paying moneys for her, such receipts and payments being carried to her account in the books of his business; and that this continued until 1856, when Messrs. F. and E. Levi and Mr. Alfred Watts were admitted as partners, and the business was carried on under the firm of P. Levi & Co. At this time it appears that there were three accounts kept in relation to the respondent, one of which, headed "Lands and Houses Private Account," showed a balance to the credit of the account of £499 1s 6d. As, how-

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

ever, there was nothing upon the face of the books to show that the respondent was interested in this item, and as subsequent moneys received on the same account were carried to the respondent's credit in another account, so that it remained unoperated upon, it was by the bookkeeper of the firm ultimately transferred to "Profit and Loss Old Account." The other accounts, however, were kept up; no change was made in the mode of keeping them, and no balance was struck. The firm received the moneys of the respondent which had formerly been received by Mr. P. Levi, and made payments to the respondent and for her use on account of them; and this continued till the date of the assignment, though the accounts were never adjusted, and no account was ever rendered to the respondent. But the continued receipt of money for the respondent upon the same account as before, without any break in the accounts, or anything to show that the moneys received subsequently to the formation of the firm were to be separated from those sums previously received and to form a distinct item, and the continuance of payments to her upon general account out of the assets of the new firm, appear to me to show conclusively that the new firm adopted the account, and made themselves responsible for it. At the time of the formation of the firm the respondent was a creditor of Mr. P. Levi; and though this did not clearly appear upon the face of the books, yet there were entries which should have put the partners upon enquiry, in which case the fact would have been ascertained at once. Being a creditor she would in the absence of notice be entitled to appropriate all payments made to her to the previously-existing debt, and they would be impliedly paid on that account unless specifically appropriated by the firm to the new debt created by their own receipt of her money; and as there was no such appropriation and no notice, the payments made to her amounted to a recognition by the firm of their liability in respect of the previous debt. We were much pressed by *Mr. Stow* with the consequences that would result from holding that a firm could become liable to debts of whose very existence they were ignorant since they did not appear upon the books. But not to notice the fact that the liability did appear upon their books—though not the name of the respondent—it must be remembered

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

that no such consequences could have followed if the accounts with the respondent had been made up and rendered from year to year; and that however hard it may be upon incoming partners to incur such a liability, it would be still more hard upon creditors if they were made to suffer from the carelessness with which their accounts were kept by those whose duty it was to exercise care in such matters. The present case appears to me to fall expressly within the case of *Rolfe v. Flower*. The mode of dealing between the firm and the respondent appears to me to show conclusively their adoption, so far as she was concerned, of the liabilities of Mr. P. Levi, and her acquiescence. Her receipt of money from them on general account was evidence of her having adopted them as her debtors, in the same manner that their payments to her, and the manner in which the accounts were continued, were evidence that they agreed to become such. I am therefore of opinion that in this respect the judgment of His Honor was right, and that the respondent is entitled to rank as a creditor of the firm. And the same is the case with regard to interest. I do not indeed attach much importance to the alleged agreement, though I think it probable that Mr. P. Levi is correct in his statement. It would be only natural, under the circumstances, that he should have explained to the respondent that, in keeping her money instead of investing it, he did not intend she should lose the interest she would otherwise receive. But I prefer to rest the case upon the ground that Mr. P. Levi was a trustee, and that the firm had notice—I might say well knew—that he held this character, and that the moneys which they received were trust-moneys; and as these moneys were by them taken into the business and employed there, they are liable to pay interest, and that interest is in accordance with the rule recognised in *Burdick v. Garrick*, to be calculated upon the plan of making rests, according to what appears to have been the practice of their business, and allowing interest upon the balances there appearing. With regard to the effect of the Statute of Limitations, no question could arise excepting from the manner in which the accounts were finally adjusted. Up to a very short time before the assignment the firm made payments, as they

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

claimed, to and on account of the respondent, and unquestionably upon general account. But inasmuch as these payments are to a great extent repudiated by the respondent, and are admitted by the firm to have been made in error, it is contended that they are not sufficient to prevent the operation of the Statute. But, apart from any other question, I am of opinion that the payments made to the respondent on her own account, which are estimated at £40 per annum, do suffice for that purpose. The practice was to pay moneys to her from time to time as she applied for them in small sums. The whole was debited to her as payments on her own account; but she contends, and I think rightly, that this was an error, excepting in respect of £40 per annum, which she admits to have received for herself. The sums were charged to her as payments in the books of the firm, and she adopts and allows them to this extent. It is impossible to argue that this would not be evidence which would warrant a jury in finding payments on account. And I think that the Commissioner was fully justified in adopting this view, and that upon this point also his judgment was right. I have referred to this point, though it is perhaps needless, since the fiduciary relation between the parties would entitle the claimant to interest. I have not said anything as to the question of jurisdiction, for we expressed our opinion on that subject during the course of the argument; nor have I touched upon that of the *onus* of proof. I incline to the opinion that the Commissioner was right in the view that he took upon this point; but I have considered the claim of the respondent entirely upon the basis of the evidences, and in fact as though there were a *prima facie* presumption that the original entries were accurate, and that it lay upon her to justify the alteration in the books. Until evidence was given, however, it would seem that the effect of the Act was to render the acknowledgment of a debt in the deed *prima facie* evidence, and to throw the *onus* of resisting it upon the trustees. The opinion I have expressed as to the case shows that I consider Mr. Levi to have been fully justified in the rectification of the account of the respondent. It was his duty to protect her as far as he was able by placing upon the books the true state of their transactions.

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

But when the effect of this was to make her a creditor for several thousand pounds instead of a debtor, it was natural and proper that the trustees should insist upon a complete investigation of the subject, and as they represent the interests of third persons, they were, I consider, also justified in carrying the case into this Court. I am therefore of opinion that the appeal should be dismissed, and the respondent should be paid her costs of appeal out of the estate.

GWYNNE, J.—The only point upon which I have entertained any doubt is the question of interest. I have put it to myself thus:—Supposing there had been no new partners taken into the firm in 1856? Then Mr. Philip Levi, who constituted the firm at that time, would have clearly been in the position of a trustee for his mother. But she was of age, and there was no infant interests. His duty was simply to receive his mother's rents, and pay them over to her. There were no express trusts as to investments, and Mrs. Levi's position was such as would have entitled her at Common Law to maintain an action for money had and received to her use. The general rule as to interest, however, only made it payable under an express agreement, or where the mode of conducting the business supported the inference of an intention to pay it. Then the question arises, would Mr. Philip Levi have been liable for interest until it had been demanded of him. I hardly think the *cestui que trust*, not having made a demand, would be entitled to interest. After conferring with my learned colleagues, however, I do not feel sufficiently strong in my view to induce me to dissent from their judgment on the matter, and therefore I concur in the appeal being dismissed on all the grounds.

WEARING, J.—This is an appeal from a decision of the Commissioner of Insolvency, admitting Mrs. Sarah Levi to claim as a creditor upon the estate of Philip Levi & Co. for the sum of £12,263 6s. 5d. The appeal is brought by the trustees appointed under the deed of assignment in that estate. The facts are so fully set out in the judgment of the learned Commissioner that it

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

is only necessary to notice them now very succinctly. From 1844 to 1856 Mr. Philip Levi carried on business alone as a merchant in Adelaide. In 1856 he associated with him his brothers, Messrs. Frederick and Edmund Levi and Mr. Alfred Watts, in a firm styled Philip Levi & Co. At this time Mr. P. Levi's business was very extensive, and when the new firm was started he had employed in it a capital of no less than £190,000. The new members brought in nothing. The terms of the partnership were defined by a brief memorandum of agreement, which was confined almost entirely to fixing Mr. A. Watt's share in the business, but silent as to the interests of the other partners. In it no reference was made either to the liabilities and assets of Mr. Philip Levi, or to the responsibilities of the new firm. There was no appraisal of the stock, nor were new books opened. In fact, the business of the new firm proceeded just as it had done under Mr. Philip Levi, with the single exception that now there were additional persons to share in the profits. From 1845 to 1856 Mr. Philip Levi had been in the habit of receiving moneys from time to time on account of the petitioner, who was possessed of various properties under a settlement. These sums he employed in his business. In 1850 he says he agreed to allow the petitioner interest upon any moneys belonging to her which from time to time he might hold. There were three different accounts relating to these transactions in his books at the time the new firm was started. One of these showed a balance on the credit side for the sum of £499 1s. 6d. The new firm continued to receive moneys and to make disbursements on the petitioner's account continuously until the 17th September, 1866, when the members of the firm executed a deed of assignment for the benefit of their creditors. Shortly before that event Mr. Eamer, the then accountant to the firm, adjusted the petitioner's account, showing a sum to her credit of £11,394, including principal and interest. Some disparaging remarks at one time appear to have been made on behalf of the trustees in reference to that transaction, but as during the argument before us they were very properly withdrawn I do not think it necessary to say more on the subject now. Before the Commissioner the petitioner claimed for £13,871 6s.

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co., COMMON LAW.

6d., but this sum was afterwards reduced to £12,263 6s. 5d. Several objections were raised before the Court of Insolvency, and afterwards before us, on the part of the trustees, to the reception of this claim. The jurisdiction of the Commissioner of Insolvency was contested. It was insisted that the deed of assignment was inoperative under Division VI. of the Insolvent Act, 1860, on the ground that Mr. Frederick Levi, one of the members of the firm, then resident in England, had not duly executed it in conformity with the 172nd clause of the Insolvent Act. Mr. Frederick Levi executed the deed by his attorney, Mr. J. G. Daly, and he afterwards by another deed ratified his attorney's act. The answer to this objection, as it seems to me, is the maxim, *Qui facit per alium facit per se*. In support of this doctrine, if necessary, the case of *Lyall v. Jardine*, L.R., 3 P.C., 318, might be cited. I am of opinion, therefore, that this objection falls. The deed of assignment, then, having been duly executed, the rights and liabilities of the several parties to it became subject to the jurisdiction of the Court of Insolvency. Has, therefore, the Commissioner rightly decided the respective claims of the parties to this appeal? It is, I understand, admitted by the trustees that sums amounting in the aggregate to what is claimed by the petitioner for principal have at different times been received on her behalf either by Mr. P. Levi or by the firm of Philip Levi & Co. They contend, however, that the last-mentioned firm are not responsible for moneys of the petitioner received by Mr. Philip Levi previous to 1856; that they are not responsible for compound interest upon the sums they received, and they also insist that the Statute of Limitations bars a large part of the petitioner's claim. There is a further contest between them and the petitioner as to whether certain sums placed to her debit ought to be so retained. Now, first, with regard to the liability of the firm of Philip Levi & Co. for what was due from Mr. Philip Levi to the petitioner when the new firm was started. The learned counsel for the trustees contended that no agreement was shown to have been made by which the incoming members undertook this liability, and, further, that no release of Mr. Philip Levi and substitution of the members of the

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & Co. COMMON LAW.

new firm with the petitioner's consent was proved. No doubt there was no such agreement shown to have been expressly entered into between the parties. Nevertheless, however, the members of the new firm may have rendered themselves liable to the petitioner. In cases like the present, indirect evidence may establish a compact equally binding with an express agreement, and the Courts, it is said, lean in favour of such arrangements, and are ready to infer them from slight circumstances. The case of *Rolfe & Bailey v. Flower, Salting, & Co., L.R., 1 P.C., 27*, appears a very strong authority on the side of the petitioner. There, a new firm continued to trade up to the period of its insolvency upon the same footing and with the same books as the old firm, making no distinction in their payments or balances or between the assets of the new and the assets of the old firm. The Judicial Committee of the Privy Council held that the dealings and transactions of the several parties sufficed to show that the new firm in its formation adopted the liabilities of the old firm. Now, the facts here are very similar. The dealings between the petitioner and the new firm proceeded just as they had with Mr. Philip Levi. Nor, as it appears to me, was Mr. Watts ignorant of these transactions at the time he joined, or at all events very soon after; for, referring to the item £499 ls. 6d., on the credit side of the ledger, he says that he considered the balance was on the wrong side, although he recognised it as the petitioner's account. The circumstance material to be noticed is Mr. Watts's knowledge of the existence of the account. The fact of its being inaccurate is under this aspect not important, and the petitioner could certainly not be affected by its inaccuracy. Then, can it be doubted that the petitioner consented by her conduct to adopt the new firm as her debtors in the place of Mr. Philip Levi alone? She continued to allow them from time to time to receive her moneys, and also she got as she required cheques signed by the new firm, and she authorized them to make payments on her account. It was to her interest to adopt this new arrangement, as she thus secured the responsibility of four persons in the place of one. Then, is she liable for several amounts which it is said have been charged to her

improperly in the books of the firm? Now, I observe that it is not pretended that she ever had the opportunity afforded her of inspecting those entries. She is therefore not bound by them if their incorrectness is shown. The chief items to which the petitioner objects as wrongly charged to her are—(1) £1,872 11s. made up of various small sums paid to Mrs. Philipson by the firm between the years 1858 and 1865; (2) £1,747 15s. 4d., consisting also of different amounts applied for housekeeping expenses; and (3) £1,397 14. 11d., put down as petitioner's portion of the expenses of a trip to England and back in company with Mr. Philip Levi. As respects the payments to Mrs. Phillipson it is clear from the evidence that they were made to her as benefactions by her brothers Edmund and Philip, and cannot therefore be chargeable to the petitioner. As regards the sums paid for housekeeping, they were all—except a moderate annual amount for her personal expenses, for which she has been held liable—expended in the maintenance of an establishment of which Mr. Philip Levi was the ostensible, actual, and therefore the responsible head. Then, with regard to the trip to England, it is in evidence that it was undertaken by her at the solicitation of her son, Mr. Philip Levi, and at his expense. It is exceedingly unlikely that she should have consented to go if by doing so he was to incur expenses very greatly in excess of her entire income. I consider that all these sums were improperly charged against the petitioner. It is not very clear how these entries came to be made. Length of time has probably obscured Mr. Eamer's recollections of those transactions. It seems to me, however, that a probable explanation consists in the dilatory way in which the books of the firm were kept. I intend this as no reflection upon the gentleman who then had charge of them. Very likely in keeping the accounts, in conducting the correspondence, and in managing the details of a business of such magnitude, they had more than they were able to do, and were therefore obliged to neglect many things. I only refer to this matter for the purpose of exonerating the petitioner from the consequences of these inaccuracies. I pass over other smaller items as matters of detail, which I do not refer to for the reason I have already

SUPREME COURT. ASSIGNED ESTATE OF P. LEVI & CO. COMMON LAW.

assigned. I will only say that I acquiesce in the finding of the Commissioner in reference to them. The claim to interest I consider established by the uncontradicted evidence of Mr. Philip Levi of the agreement made between him and the petitioner in 1850, and the right to have it computed by rests seems to me to be in accordance with the practice of the firm in similar cases. Regarding it in this light it is not necessary to consider the argument in its support derived from the fiduciary relation subsisting between the parties and the misapplication of trust funds by Messrs. Levi & Co., though I believe that the doctrine applicable to such cases furnishes additional support to the petitioner's contention. As regards the effect of the Statute of Limitations, I consider that the petitioner is entitled to rely upon the numerous payments made by Philip Levi & Co. from time to time on her account, and especially those in discharge of rates, as taking the case out of the Statute. On referring to the accounts I find those payments were frequent and continuous, extending over the whole period of the monetary transactions between the parties, the latest being made in September, 1866. It is apparent, also, that whenever these payments were made the firm had money belonging to the petitioner in their hands, and it is to be inferred therefrom that they made those payments on her account out of that fund. The petitioner's counsel urged additional argument in support of his contention in this part of the case, but these I do not consider it necessary to examine. On each of the grounds, therefore, raised on this appeal, I am of opinion that the Commissioner's judgments should be affirmed.

Appeal dismissed. All costs to be paid out of the estate.

•

HANSON, C.J., GWYNNE, J., WEARING, J.]

[COMMON LAW.

20 AUGUST AND 13 OCTOBER, 1874.

MILES AND OTHERS V. KING.

MEASURE OF DAMAGES.—*Goods received "for the benefit of all concerned."*

Certain bales of wool were shipped on board the defendant's barge "Venus" for dispatch by the ship "Timaru," then loading for London.

Through the negligence of the defendant, portion of these bales became submerged on the passage, but were partially recovered through the exertions of the plaintiffs' overseer, who expressly stipulated that they were to be so recovered "for the benefit of all concerned."

Some time was occupied in recovering and rendering fit for transport the submerged wool, and while the unsubmerged portion reached Goolwa, and was forwarded to London by the "Timaru" as originally intended, the submerged portion, or such of it as had been recovered, did not arrive in London until some months later, when a rise had taken place in the wool market. The consequence was that this recovered wool realized a higher price than that which had arrived by the "Timaru."

On the question of the measure of the damages—

Held — Per GWYNNE, J., and WEARING, J., (HANSON, C.J., dissentiente)— *That the plaintiffs were entitled to recover the value of the lost bales estimated at the market price of wool at Goolwa at the time when they would have arrived but for the negligence of the defendant; and that the defendant was not entitled to be credited on account with the increase of price actually realized on the recovered bales over and above what they would have realized had they arrived in due course, less the cost of recovering and repacking the same.*

RULE nisi to reduce the damages by crediting the defendant with the difference between the amount which the recovered wool realized in London and the price which it would have brought if it had gone to England with the remainder of the bales in the "*Timaru*," or for a new trial on the ground that the damages were excessive, and of misdirection as to the measure of damage.

On the motion for the rule the following authorities were cited :—

Angel on Carriers
Story on Bailments
Sedgwick on Damages
Maine on Damages.

The action was tried at the Civil Sittings.

The declaration alleged that the defendant contracted under bills of lading with the plaintiffs' agent to carry from the Toorale Station to Goolwa 776 bales of wool, but that the defendant had failed to deliver the total number of the said bales at Goolwa, and had also failed to deliver certain other bales in good order and condition. And the plaintiffs claimed £2,000.

The defendant pleaded *non assumpsit*, denial of the breach of contract, and that he was prevented from fulfilling the contract by the perils and casualties excepted under the bills of lading.

From the evidence adduced at the trial, it appeared that in the month of November, 1872, the quantity of bales mentioned in the declaration were arranged to be shipped on board the defendant's barge "*Venus*," the wool being taken on board at a landing-place on the Toorale Station and carried to Goolwa, under consignment to Messrs. Acraman, Main, & Co., the agents for Messrs. Miles & Co. After the loading had been completed, the number of bales mentioned were by some means precipitated into the water. The balance was duly carried according to contract, and went on to England by the ship "*Timaru*," which loaded at Port Victor. The plaintiffs' manager at first declined to take any responsibility as to wool which fell overboard, but ultimately agreed to assist in dressing it for the market "for the benefit of all concerned." A considerable time was spent in converting the wool from greasy into washed fleece, the evidence being that its original state was irretrievably injured by the submersion. It was subsequently carried under the plaintiffs' directions to Goolwa, in a barge belonging to Captain Johnston. It was then shipped to Melbourne,

and from thence to England, where, in consequence of a rise in the market, it realized a much higher rate than the consignment which had been carried by the "*Timaru*." At the trial, a verdict was given for the plaintiffs for £1,653 3s. 4d., leave being reserved to reduce the damages

Way, Q.C., now moved to make the rule absolute.

Stow, Q.C., showed cause.—No part of the wool which fell overboard was received by the plaintiffs. There could have been no question as to the right to recover the full value of the quantity not delivered, and at the rate which ruled at the port of destination when the whole cargo should have arrived there. The only point which arises, therefore, is as to the principle upon which the recovered wool is to be valued. In order to ascertain the true bearing of the case, it is only necessary to look at what the defendant agreed to do, then to consider whether he fulfilled his contract, and lastly, what is the plaintiffs' loss. It will be admitted that irrespective of the salvage wool the defendant is liable to the extent of the market price of all wool not delivered under the contract. The cases cited in moving the rule *nisi* only go to establish that the receipt of salvage does not take away the right of action for negligence, but operates to reduce the amount of damages recoverable. The contention on the part of the defendant, however, is that the plaintiffs' having received the wool recovered, the deduction to be made in the defendant's favour is not what it was worth at the time when it ought to have been delivered, but the amount realized by it, no matter when or where sold. If property were injured at a place where there was no market, and the owner elected to take it then and there, a difficulty might arise as to the correct manner of estimating its value; but no such complication arises in connection with the case before the Court. The defendant argues that if the salvage wool had been sent with the remainder of the quantity contracted to be carried by him to England by the "*Timaru*" a much smaller sum would have been received for it. But that has nothing whatever to do with the defendant, whose contract and connection with the

plaintiffs were at an end after the date when delivery of the wool should have been made at Goolwa. It is clear that the defendant could not have been affected by a fall in the London market, and by every principle in law and equity he is, therefore, not entitled to any advantage in consequence of the rise. The defendant would also be chargeable with the expenses incurred in preparing the wool recovered for market. The risk of selling the property at a particular time was entirely borne by the plaintiffs. The case then comes under the general rule, which fixes the damages at the price obtainable at the port of delivery at the time such delivery should have been made—

Addison on Torts

O'Hanlan v. Great Western Railway Company,

6 B & S. 484

Story on Bailments

Rice v. Baxendale, 30 L.J., Ex., 371.

Boucaut, on the same side.—There is no case which establishes that the measure of damages would be affected by the fact of some of the injured goods being subsequently sold at another place at a higher rate than that obtainable at the destination fixed at the time when delivery should have been made. The sale of the salvage wool in England was purely a speculation of the plaintiffs. If, instead of having anything to do with the wool which was submerged, the plaintiffs had purchased a sufficient quantity to make up the deficiency, and charged the defendant with the cost, it can hardly be contended that the latter would be entitled to the benefits of any increased price above what had been paid for it obtained in the English market for the wool so bought. (GWYNNE, J.—It appears to me, that after delivery at the port of destination the defendant was a stranger to the plaintiffs as far as any further transactions with wool were concerned.)

Way, Q.C., in support of the rule.—Counsel for the plaintiffs have only addressed themselves to one feature of the case. The general principle of law which has been laid down as to damages for non-delivery of goods by a carrier cannot be controverted; but complications arise in the case under consideration which to some

extent take it out of the rule referred to. The defendant contends that the special circumstances connected with the recovery of the bales which fell overboard amount to a special contract, under which the defendant is entitled to the benefit of the value realized by the salvage wool. The simple fact of certain bales having fallen into the river did not *per se* amount to a breach of the defendant's contract, which was only broken by the failure to deliver within a reasonable time. It is to be observed also that it would be competent for a consignor to stop goods *in transitu* if he could obtain them without inconvenience to the carrier. On the goods being injured, also, the plaintiffs could have said that they looked to the defendant to perform his contract, and, therefore, positively decline to have anything to do with the salvage. The defendant submits that such was the course adopted in the case before the Court. The manager of the station declined to take any responsibility after the accident happened until a special contract was entered into. (*Stow, Q.C.*—Points are being raised which were not taken at the trial. It has never been suggested previously that the salvage was at the risk of the defendant, or that the plaintiffs had not taken possession of it.) The evidence and the letter put in by the plaintiffs point clearly to an agreement by which the goods were to be retrieved, as the overseer said, "for the benefit of all concerned." The plaintiffs, therefore, by their agent, expressly refused to take possession of the damaged wool on their own account, but agreed to become trustees for the benefit of all parties in rendering the recovered wool fit for market. The bulk of such wool, also, was converted into something totally different from its original character. (*Stow, Q.C.*—It is quite clear, at any rate, that the salvage was delivered to the plaintiffs at Goolwa, and by them shipped to England.) The property was under the direction of the plaintiffs, and whatever they did in the exercise of a reasonable discretion, the defendant would be bound by. It is to be remembered, too, that the defendant had not contracted to deliver washed fleece, but greasy wool. Under the special contract, there was no place of sale fixed, and, therefore, the plaintiffs were at liberty, but in the interests of all parties, to dispose of the salvage where they thought best. (*Stow, Q.C.*—We sue not only

for failure to deliver, but also for damage done to the wool.) The Court will look at the evidence as well as the pleadings in order to ascertain how the plaintiffs shaped their case. (*Stow, Q.C.*—If the point as to the possession of the salvage had been raised on the trial, I should have urged that the question was one for the jury to decide.) (*Hanson, C.J.*—I certainly did not at the trial see the importance of the point; but having stopped *Mr. Way* at the time in his argument as to what should be the proper measure of damages, it would be unfair to disallow any points which might then have been submitted.) (*Stow, Q.C.*—The point reserved was whether the defendant had a right to the benefit of the difference between the sum which the wool actually fetched and the market price at Goolwa when it should have been delivered there under the contract. That does not raise the point now urged, and which is clearly an afterthought.) The point as to the substituted contract is involved in the argument that the defendant is entitled to share in the extra price obtained for the salvage wool. The only complication has arisen from his having mistaken London for the port of destination. If the defendant's contention be right, the verdict will have to be reduced to about £571. It is quite clear that the Court has the power to reduce damages, even after verdict—

Maine on Damages.

If the damages be not reduced, however, a new trial might be granted. As to the salvage having been delivered to the plaintiffs it is noteworthy that another carrier brought it from Toorale to Goolwa, and it has never been in defendant's possession after plaintiffs recovered it at Toorale. How then can the defendant be said to have delivered it at Goolwa? There is also no case which establishes that salvage goods are to be treated as part of the original consignment, and their value ascertained at the port of destination. On the other hand, a good reason can be shown for not doing so. If goods are damaged in transit the carrier is bound to do the best he can for the benefit of all concerned, and if the owner undertakes the responsibility he will be in the same position.

The plaintiffs seek to recover £1,600, while their actual loss only reached less than one half of that amount. Both at law, therefore, under the special contract, and on all principles of equity, the defendant is entitled to his rule.

Ingleby, on the same side.—The vital question is as to the arrangement for rendering the damaged wool fit for market. The only construction of the words used by the plaintiffs' manager—"for the benefit of all concerned"—is that the attempt should be made to lessen the loss sustained through the accident. Under the bill of lading, also, on which the plaintiffs' action is based, there clearly can be no charge for expenses incurred in retrieving the damaged wool. That was done under the special contract. If the argument as to saving the wool was not as the defendant put it, the only inference would be that it was for the benefit of the plaintiffs only, and not "of all concerned." On the whole case it is evident that the original contract was altered before breach, and on such altered basis the Court will judge the question at issue.

Cur. ad. vult.

13 October—

HANSON, C.J., read the judgment of Mr. Justice WEARING (absent on circuit) on the rule for a new trial in this case, as follows:—This was an action brought by the plaintiffs, the owners of certain wool shipped by them on board a barge of the defendant, to recover damages for the injury they had sustained by reason of the short delivery of part and the damage done to the residue of their property by the negligence of the defendant's servants. The plaintiffs carry on business as sheepfarmers at a station on the River Darling, called Toorale. In November, 1872, they placed on board the defendant's barge, the *Venus*, 953 bales of wool, which were consigned to their agents, Messrs. Acraman & Co., at Port Victor. A bill of lading, containing the usual clauses, was at the same time signed by the defendant. According to its terms the wool was to be delivered at the Goolwa, and thence it would have to be carried by the tramway to Port Victor. At Toorale 221 bales fell overboard, in consequence, as the jury found, of the

negligence of the men employed by the defendant to load the barge. Some bales were wholly lost, but 163 were recovered. When taken out of the river they were found to be in a thoroughly unmerchantable state. Some difficulty at first arose as to the taking possession of them, but eventually Mr McPherson, the plaintiffs' manager, undertook to have the wool cleaned "for the benefit of all concerned." Of course these operations caused delay; but at length the 163 bales were carried in a barge of Captain Johnson's, and delivered to the plaintiffs' agents at Goolwa. Subsequently they were sent by those gentlemen, by way of Melbourne, to London, where the wool was sold. But before these bales arrived at the Goolwa the first lot of 732 bales had been shipped by Messrs. Acraman, Main, & Co., to London by a vessel called the *Timaru*. Between the arrival in London of this wool and the 163 bales shipped afterwards by the *Northumberland* there had been a rise in the price of wool in the London market, which beneficially affected the sale of the 163 bales. There is no difference between the parties to this action as to the way in which the gross amount of damages for which the defendant should be liable is to be computed. The only question is as to what he is entitled to claim in reduction of that damage for what I call the salvage wool, the 163 bales. The plaintiffs' counsel contend that the value is what it would have realized if it had been sold at the Goolwa at the time the *Venus* arrived, less the cost of preparing it for the market, and the interest upon its value during the period of its detention at Toorale. The defendant's counsel on the other hand says that he is entitled to a credit for what is actually realized in London, less the expenses at the station incurred in getting it fit for the market, the freight to Melbourne, insurance, and interest. Now, I apprehend the general rule to be that when goods are lost or deteriorated during a voyage by causes which do not come within the exceptions in the bill of lading, the owner is entitled to claim as damages the amount they would have realized at the port of destination if they had arrived in due course. Here the port of destination was the Goolwa, and the time when the wool ought to have reached that port is fixed by the arrival of the *Venus*. It seems to me also that the way in which the valuation of the

salvage should be made must, in the absence of any special agreement to the contrary, follow the same rule. Now, was any special agreement made here? The defendant says that there was, and he relies in support of that view upon an expression which was used when the wool was taken possession of at Toprale by Mr. McPherson. In my opinion the conduct of the parties affords no evidence of any such agreement. When Mr. McPherson said that he would have the wool scoured "for the benefit of all concerned," he meant, I conceive, to intimate merely that he took no step to compromise the interests of any person who might turn out afterwards to have any claim in respect of the wool—whether as the original owners, the carriers, or the insurers—of whose several rights he is to be presumed to have been at that time ignorant. But the respective claims of the plaintiffs' and the defendant being at that period determined it devolved upon the defendant, if he thought it for his interest so to do, to obtain a fresh agreement in substitution of those claims. But there is no evidence of his having done anything for that purpose. He did not take possession of the wool after it had been scoured, nor did he stipulate that it should be forwarded to any market different from that to which it was then destined, viz. the Goolwa. At that place the plaintiffs, with his consent, took possession of it. It appears to me that then and there the transaction between the parties was concluded. The defendant gave no intimation that he desired to retain thenceforth any interest in the wool, nor did he offer any guarantee to the plaintiffs against any loss which might result from its transshipment to any other port or its sale in any other market. In my opinion, if it had been lost, or sold at a diminished price, he would not have been responsible in either case to the plaintiffs, the entire risk, therefore, was that of the plaintiffs; and, in accordance with the maxim *qui sentit onus sentire debet et commodum*, in my opinion it ought to enure for the plaintiffs' benefit. I therefore think that they are entitled to retain their verdict, and that the rule should be discharged.

GWYNNE, J., delivered judgment as follows:—The only question on this rule is as to the amount of the damages. The facts of the

case are sufficiently stated in the judgment of my learned colleague Mr. Justice WEARING, and so I will no further allude to them than to state that 776 bales of wool were originally shipped under the contract constituted by the bill of lading. Of these 221 fell into the river just prior to the completion of the loading, out of which 193, though damaged, were recovered, but 28 bales were utterly lost in the water. As to the residue (555 bales) they were carried on to the Goolwa, and there delivered to the plaintiffs in good condition, and by them shipped to London by the *Timaru*. As respects the lost wool no question arises as to the measure of damages. It is admitted on all hands that the measure was the market price of wool at the Goolwa at the time of the delivery of the sound wool, but the contention is as to the measure of the damages applicable to the 193 bales which were got out of the river. The evidence shows that there was a reluctance on the part of the plaintiffs' overseer, arising from a fear of compromising his principals' rights, to interfere in endeavouring to rescue the wool from the river. However, that reluctance was got over by an arrangement between the overseer and the defendant to the effect that the overseer should act in the matter for the benefit of all concerned. The overseer, in pursuance of that arrangement, commenced operations, and ultimately recovered the 193 bales, which he washed, dried, repacked, and rendered merchantable. These bales were sent down the river to Goolwa, received by the plaintiffs and thence shipped by them to England in a ship which left some time after the *Timaru*. Singularly enough, these bales sold in England for a much higher price than the wool shipped by the *Timaru*, and the defendant now claims to have the benefit of the difference put to his credit on account, and thus to diminish the amount of the damages. And he bases his claim to this benefit on the ground of the arrangement I have previously referred to as taking place between himself and the plaintiffs' overseer. And while his learned counsel speaks of a special contract, and argues that it superseded his obligations arising from the compact made by the bill of lading, I am unable to see from the evidence that any such contract can be implied from the conduct of the parties. It certainly was not expressed, and is a

most unusual, if not unheard-of character. Hence the probabilities are very much against it, and the law would require strict proof of its existence. The property in the wool was never out of the plaintiffs. It was optional with them to refuse to receive it when damaged or lost, and immediately to stand upon their rights under the bill of lading, or to receive it under protest, and sue for the difference between the wool in good condition and when injured by the defendant's negligence. They seem to me in effect to have adopted the latter alternative, and assuming the condition of the 193 bales when brought to Goolwa to have been as good as the 555 bales, the plaintiffs would have been entitled, as damages to the cost of rescuing, washing, and repacking the wool, freight, interest, &c., which the plaintiffs now demand. I think, therefore, the rule should be discharged.

HANSON, C.J. delivered judgment as follows :—This is an action brought by the plaintiffs, as shippers of goods, against the defendant as carrier, for loss sustained by the negligence of his servants. At the trial before me a verdict was found for the plaintiffs on the question of negligence, and I directed the jury that the measure of damages was the difference between the value of the goods at port of their destination if they had been safely delivered by the defendant according to his contract and the value of the recovered goods at the same port at the time of their arrival in the condition in which they then were, deducting from such last-mentioned value the amount which had been paid by the plaintiffs to bring it into that condition, but I reserved leave to the defendants to move to reduce the damages to the actual difference between the sum which the plaintiffs would have realized by the sale of the goods in London if they had been delivered according to contract and that which they did actually realize. A rule *nisi* has been obtained to reduce the damages pursuant to the leave reserved, and also for a new trial on the ground of misdirection—that I ought to have directed the jury that the true measure of damages was not the difference between the sum that would have been received by the defendants had they not sent the goods on to London and that which they did receive, but between

the latter sum and the value of the goods at the place of destination at the time at which they ought to have been delivered, and this rule we have to determine. The material facts are that the plaintiffs shipped on board of the barge of the defendant about 776 bags wool, to be taken from Toorale, the place of shipment, to Goolwa, under a bill of lading, and that by the negligence of the servants of the defendant 221 bales of this wool were lost overboard from the defendant's barge, of which only 163 were recovered; that those which were recovered were so wetted as to be incapable of being taken on by the defendant, and that it was necessary to unpack the whole, to scour the greasy wool and to dry the scoured, and to repack it in fresh packs; that before this was done one Henderson, who was manager for the plaintiffs at the station at which the wool was shipped, and had in that capacity shipped it for them, told the defendant that the wool was out of his hands, and he wanted authority to take it out of the river, upon which the defendant gave him a written authority, which had been lost, but which authorized him to recover and unpack the wool on behalf of all parties concerned. Under this authority Henderson set to work to recover the wool, unpack, scour, dry and repack it, and he then forwarded it by barge to Mannum, not belonging to the defendant, and in so doing incurred certain expenses which, with one exception, that of £50 paid to himself, were added to the account of the damages. The larger part of the wool originally shipped arrived safely at its port of destination in December, 1872, and had the wool lost overboard arrived at the same time it would have been worth at that port £3,694 13s., according to the estimate of Mr. Luxmoore, a skilled witness called on behalf of the plaintiffs. When, however, such of it as had been recovered did arrive, which was in March, 1873, there had been a fall in the price in Adelaide, which affected its value at Goolwa, and it was valued by the same witness at £2,341 9s. 8d., from which had to be deducted the cost of recovering and repacking, estimated by the jury at £300, so that the damages, according to the rule laid down by me to the jury, amounted to £1,653 3s. 4d. It was, however, shown that had the lost wool been delivered at the Goolwa according to the bill of

SUPREME COURT.

MILES AND OTHERS V. KING.

COMMON LAW.

lading it would have been sent to London by the *Timaru*, and would have sold for £4,379 1s. 5d., while the recovered wool when sent home fetched £3,965 4s. 1d., there having been a rise in the price of wool in London, so that the loss to the plaintiffs, adding the £300 for the cost of recovering, together with freight to Melbourne, tare, and net, would be £848 17s. 2d. Upon these facts the plaintiffs contended that the true measure of damages was that which I had laid down, the loss of the plaintiffs being estimated at the market price of the wool at the port of delivery at the time, less the value of the wool actually delivered at the same place when it was so delivered. And on the other hand the defendant contended that though I had properly laid down the measure of the original loss of the plaintiffs, yet that the deduction from that was not the estimated value of the wool at any selected place, but the net price realized by the plaintiffs from its ultimate sale, and on consideration I am disposed to agree in the latter view. No question was raised as to the measure of the original damages, and upon the case as it stood at the trial that must be regarded as having been fixed by the case of *O'Hanlan v. Great Western Railway Company*, and the latter case of *British Columbia Sawmill Company v. Nettleship*, 3 L.R., C.P., 499. It is the market value of the goods at the time and place at which they ought to have been delivered, together it may be with interest to compensate for any delay in replacing them. But the question arises upon the amount by which that sum is to be reduced, and upon this, so far as I am aware there is no authority. It never appears to have arisen, and certainly, so far as I can discover, there is no case to support the plaintiffs' contention that the value of the saved article when ultimately forwarded is to be estimated at the price it would fetch at the intended port of delivery. And upon principle I am unable to see why it should be so estimated, since the reason for their estimating the value of the article when not delivered appears to be that this is the sum which the plaintiffs might obtain for it if he desired to sell, or at which he might replace it if he wished to use it or send it to another destination. And this reason does not apply in such a case as the present. Looking then at the position

of the parties, it appears that the plaintiffs' had a complete cause of action on the arrival of the defendant's barge at the Goolwa without the wool. The defendant had entered into a contract by the bill of lading to deliver a certain number of bales, and he had failed to deliver 221, a part of that number, and had, moreover, incapacitated himself from delivering the greater portion in its original form; it would be no longer greasy wool, but scoured. The plaintiffs' would have a right to do what the evidence shows that they actually did—refuse to have anything more to do with the wool, treating it as altogether out of their hands, and, so far as they were concerned, casting the whole responsibility upon the defendant; and they might the day after the arrival of the barge at the Goolwa have produced their bills of lading and demanded the whole of the wool, and have brought an action against the defendant to recover all that was short delivered, when, if they had convinced the jury that the non-delivery arose from his negligence, they must have succeeded in their action. Nor would the defendant in the action have reduced the damages by the value of the wool saved, for the plaintiffs' had not taken it as owners but merely held it on account of all concerned. But then it would seem to be clear, according to the judgment of the Court in *Rowe v. Salvador*, 3 Bing., N.C., 288, in the analogous case aforesaid, that they must have accounted to the defendant for the net sum which they received in respect of the wool saved, and that he might have recovered this amount from them in an action for money had and received; and after the best consideration I can give to this case I think that this is substantially the position of the defendant now. He failed to deliver the goods according to his contract, and he had incapacitated himself for so delivering them, as we must assume, by reason of negligence, so that the plaintiffs' right of action was complete at the time the barge arrived with short loading at her port of delivery. The contract was broken, and nothing more was done under it, for the agent of the plaintiffs', acting as I conceive, prudently in the interests of his employers, refused to have anything to do with the wool on their behalf; and the subsequent delivery at Goolwa by a barge not belonging to the defendant, and without his authority, could not be taken to be a delivery in pur-

suance of the contract. The action of Henderson was a dealing with the wool either for the benefit of the plaintiffs or for that of the insurers as the case may be. The wool could not be carried on in its actual condition, and something must be done to render it fit for transport; nor could it then be determined who was to bear the expense. If the defendant had not been guilty of negligence, the loss occasioned by the accident would have fallen upon the plaintiffs or upon the insurers, according as the wool had or had not been insured. If as the jury found it was occasioned by negligence, then the defendant would have to bear that loss; but whatever might be its incidence, Henderson, or rather the plaintiffs, for they appear to have adopted his act and to have carried it out, would be bound to do the best to secure and repack the wool, and to obtain the best price for it. Then upon what ground can it be said that the value of the wool at the original port of destination at the time when it arrived there in its altered condition is to be the measure of its value? I fail to find any. If the plaintiffs, acting for the benefit of all concerned, had sold it then in the exercise of a wise discretion, then the price that it realised would have been not an element in estimating the loss of the plaintiffs or the damages to which they were entitled, but the amount which the defendant was entitled either to set off against their demand for damages on equitable grounds or money which he could have received from them as money had and received to his use. But they did not so sell it—probably it would have been imprudent to have done so—they sent it to London. But it does not seem that by this they divested themselves of the character which they had assumed, or that they are entitled to appropriate to themselves the profit which arose by reason of their doing what a prudent agent presumably could have done under the circumstances. On the contrary, if the action had been brought and tried before the accounts sales were received in the colony so that the plaintiffs had recovered the whole loss the defendant might so soon as such amounts were received have sued them for the net amount produced by the sale of the wool; and I am unable to see in what respect the rights of the parties are affected by reason of the action not having been brought until after the wool had been sent for sale

to London. The argument of the plaintiffs appears to assume that Henderson took possession of the wool as the agent of the defendant, and for the purpose of enabling him to carry out his contract. That view, however, is contradicted by their own evidence, which shows that the authority given by the defendant to Henderson was not to act for him, but to act for the benefit of all parties concerned. And not merely does their own evidence show this—that this was what was done by the defendant—but the facts of the case show that there was nothing else which he was likely to have done. For him to have constituted Henderson his agent to carry out the contract would have been to admit that the loss was the result of some negligence for which he was responsible, and that certainly he had no intention to do. It is true that according to Henderson he said, on first hearing of the accident that there must have been carelessness, but this was before he had seen Tait, the master of the barge, and had heard his version of the affair, and his conduct since shows that he has throughout consistently disclaimed any further responsibility under the contract either to forward the goods or to make compensation for them. It would, therefore, have been most unwise to have done any act to recognise his liability at this time, and no jury upon the evidence could possibly have held that he did or intended to do this. On the contrary, the very form of authority which he gave showed that he considered the contract at an end as far as he was concerned, for it is one well known in matters of shipping, which places the person authorised in the position of an indifferent agent, not acting for the benefit of any specified person, but bound to do what he believes will be most advantageous in reference to the subject matter, and so to cause the loss to fall as lightly as possible on the party who is ultimately found to be liable; and though the jury have found that the defendant was in fact liable, this cannot affect the character of his act at the time. The verdict, makes him responsible for his failure to carry out his contract since it decides that such failure was not occasioned by any of the excepted perils; but it also, as I conceive, entitles him to the benefit of any moneys received by the the plaintiffs in respect of the cargo short delivered. I am therefore of opinion that the defen-

SUPREME COURT.

MILES AND OTHERS V. KING.

COMMON LAW.

dant is entitled to have the rule for a new trial made absolute on the ground of misdirection ; but it is probable that if that were done evidence might be given to show that the true reason of the original loss of the plaintiffs was not the value of the wool in Goolwa, but the price it realized in London, as there would have been no means of replacing the lost wool in the former place, and it was shipped on board the defendant's barge—probably with his knowledge—for the purpose of being sent on to the latter, thus bringing this case within the principle of *Rice v. Bazendale*. As, however, my learned colleagues entertain a different opinion from myself upon the main question, it is not necessary to consider this point, and the rule must be discharged.

Rule discharged.

GWYNNE, PRIMARY JUDGE.]

[EQUITY.

22, 23, 29, AND 30 SEPTEMBER, AND 27 OCTOBER, 1874.

BRADY V. BRADY AND OTHERS.

REAL PROPERTY ACT, 1861.—Certificate issued pursuant to fraudulent application.

M, the eldest son of a deceased registered proprietor, fraudulently applied in the name of his father to have certain lands brought under the provisions of the Real Property Act, 1861, stating in his declaration in support, amongst other things, that he was not aware of any mortgage other than set forth and stated as follows:—
"That K lent to me the sum of £250 sterling on the security of the said piece of land, and that I have agreed to execute and register a mortgage for the said sum to the said K or to whom he may desire."

A Certificate of Title was accordingly issued in the name of the deceased proprietor, and on the date when the same was issued, M executed in the name of the deceased a Memorandum of Mortgage to Der Deutsche Club to secure the sum of £250 and interest, presumably the same sum expressed in the application to have been advanced by K.

On Bill filed to set aside the Certificate and Mortgage—

Held—That the Lands Titles Commissioners had no power under the circumstances to issue the Certificate of Title in the name of a dead man. That such Certificate was, therefore, a nullity; and that the Mortgage, being based on the Certificate, fell with it.

That neither the heir-at-law of the testator, the executors of his will, the Registrar-General, nor the Lands Titles Commissioners, were necessary parties to the above suit.

That the Court of Equity has concurrent, if not sole jurisdiction in cases of fraud arising out of the Real Property Act of 1861.

THE demurrer arose out of the will of Michael Brady, late of Gawler Plains, farmer. The testator, as owner in fee of part of Section 3259, Hundred of Munno Para, by his will directed that it should be sold on January 27, 1864, and the proceeds equally divided between his two sons the plaintiff, Michael Patrick Brady, and one of the defendants, Daniel Thomas Brady, subject, however, to a charge of £100, to be equally divided between the testator's two daughters. The testator died on June 10, 1862, and his executors duly registered and proved his will on September 10

and November 19 of that year respectively. The defendant Daniel Thomas Brady, subsequently, fraudulently suppressing the will of his father, possessed himself of the deeds of the land in question, and applied in the name of the testator to have the land brought under the Real Property Act, and procured the issue of a certificate of title on September 7, 1871. He then executed a mortgage of the property in the name of Michael Brady to the German Club, to secure the sum of £250 and interest. The plaintiff, therefore, prayed that the certificate of title referred to might be cancelled, and that its effect, and also that the mortgage to the German Club, might be declared to be wholly void and inoperative.

Both the defendant, Daniel Thomas Brady, and also the German Club demurred to the plaintiff's bill. The points mainly relied on by the defendant, the German Club, were that the Court of Equity had no jurisdiction in the matter involved in the suit; that the plaintiff had no equity by virtue of which he could ask relief from the Court; that the plaintiff had not joined all the necessary parties to the bill; and that there were inconsistencies in the allegations of the bill.

Boucaut, for the German Club, in support of the demurrer.—The cases of legacy and debt are analogous as far as the necessary parties to a suit are concerned, every one interested, with a few exceptions, having to be brought before the Court. In the case of legatees, one might represent the whole of them, or the trustees might stand as representatives of the *cestui que* trust: but the heir-at-law, whom the plaintiff has not joined, is always an indispensable party to a suit such as the one before the Court—

Mitford on Equity Pleading.

Story's Equity Jurisprudence.

The only exception to the rule is when the heir cannot be reached, but then he would not be bound by any decree made in his absence. (GWYNNE, P.J.—Land directed to be sold under a will

SUPREME COURT. BRADY V. BRADY AND OTHERS.

EQUITY.

is in equity a conversion, although the dry legal estate remains in the heir-at-law.) That being so, the bill must fail, as it asks the Court to deal with the land. It is evident that the executors take no legal estate—

Doe d. Hampton v. Shotter, 8 A. & E., 905
Williams on Executors.

And the plaintiff was also wrong in saying that he has any estate in the land. (GWYNNE, P.J.—I think the plaintiff has a sufficient interest to enable him to prosecute the suit.) On the question of parties it is quite clear, also, that the Registrar-General and the Real Property Commissioners should have been brought before the Court, inasmuch as the bill seeks the cancelling of a certificate of title, and the whole case arises out of their acts, and the plaintiff might possibly have proceeded against them for negligence in not discovering that the will of the testator had been registered. Then, as to want of jurisdiction. The Act establishes a tribunal for the purpose of bringing land under the Act, which tribunal is the Judge, and has to make certain enquiries (sections 14 to 19) and upon being satisfied with the result of their discretion (section 20) bring the land under the Act. (GWYNNE, P.J.—But the plaintiff says it is not under the Act.) It is *de facto*, and must continue so *de jure*, unless the Commissioners' adjudication be repealed by *scire facies*. Further, under the Real Property Act, there are certain clauses which provide for the cancellation of certificates of title under certain circumstances, which circumstances, however, it is noteworthy are much wider in their scope than the analogous provisions of the Irish Encumbered Estates Act—

In re Walsh, Irish Law Reports. 1 Eq., 399.

Under section 35 of the local statute it is enacted that the certificate of title is to be conclusive evidence except in certain cases, and the facts disclosed by the plaintiff's bill do not come within either of the exceptions. But clause 135 gives the Lands Titles Commissioners power in cases of error or fraud to cancel the

certificates which they have issued. (GWYNNE, P.J.—But what position would that leave the innocent mortgagees in? Could the Commissioners withdraw the certificate and retain the mortgage in full force and effect? Or would the mortgagee have a claim on the Assurance Fund?) Perhaps he would, although it is doubtful; or, perhaps, the certificate might be reissued to another person, subject to the mortgage. At any rate, on the question of jurisdiction, it is evident that where a statute enacts a new set of rights and also new remedies, the latter can only be obtained under the special machinery of the statute—

Edwards v. Coombe, 27 L.T., N.S., 315.

Probably the case of—

Bray v. MacDonald, 1 S.A.L.R., 20,

may be relied on by the plaintiff in support of his bill, but the distinction is that in that case, which was one under the shipping laws, the duties of the Customs officer were purely ministerial and not judicial, as are the functions of the Registrar-General and the Lands Titles Commissioners. Clause 26 of the Real Property Act also supports the view that the plaintiff has chosen the wrong tribunal from which to obtain any relief which he may be entitled to. (GWYNNE, P.J.—What would be the effect of the cancellation of the deeds by virtue of which the certificate of title is issued? It does not very clearly appear, also, how it is to be done. If the deeds are effectually destroyed, I do not see how I can restore to the plaintiff the muniments of title to the land.) That is what I contend. The plaintiff cannot get relief from this Court. Even the Lands Titles Commissioners can only amend the certificate of title. They cannot revive the cancelled deeds. As to the form of demurrer, it has been taken from—

Parry v. Owen, 3 Atk., 739.

The next point is as to the plaintiff's want of equity. In the first place, the plaintiff, as before remarked, is not entitled to the land

in question. (GWYNNE, P.J.—The case does not come within the general class where executors have to distribute the proceeds of the real estate after sale, for there a power of sale is implied. It is doubtful whether Mr. Brady's executors had that power, but assuming they had, it did not touch the question of the legal estate. I think the legal fee-simple was in the heir-at-law.) I would point out as to that, also, that the plaintiff's bill is not in proper form. The suit should have been an administration one, as the cancelling of the certificate would not do complete justice between the parties. Then, further, the plaintiff has been guilty of great *laches* in not moving in the matter earlier. (GWYNNE, P.J.—No *laches* would cover fraud. In the case under consideration the bill sets up a great fraud. I think the defendant Brady intended to personate his deceased father, which he accomplished successfully by his fraud and the gross negligence of the solicitors of the Lands Titles Office, for had the latter searched the Registry Office records properly they would have discovered the will of the testator. They, therefore, have been guilty of negligence which would have rendered an ordinary attorney liable to heavy damages.) Although no *laches* would protect the person actually committing the fraud, yet the point can be taken on behalf of a third party, which is the position of the German Club in the case before the Court. (GWYNNE, P.J.—Under the law of England if a person steals a horse, for instance, and sells it, the innocent purchaser will not be protected, against the real owner if the latter secure the conviction of the thief. If the whole of the defendant Brady's action were steeped with fraud throughout, the plaintiff would probably contend that the whole of the transactions in connection with it were void.) Even on that view of the case, the plaintiff cannot come to a Court of Equity for relief, as the Court cannot cancel deeds which are in the hands of innocent persons. It would only nullify deeds to prevent them getting into the hands of third parties. (GWYNNE, P.J.—According to the defendant's contention, a son might improperly procure deeds from his father, get the property brought under the Act, and then sell it to a third party, whose claim would prevail against the father. If that were so, the Real Property Act introduces a state of things quite antagonistic

to the recognized principles of equity.) The doctrine is a startling one, but such is clearly the policy of the Act. The fact of the existence of such an extraordinary thing as the Act giving a remedy against the State through the Assurance Fund supports the idea. However fraudulently the certificate has been obtained, it is good in the hands of innocent transferees. As to the certificate of title being voidable on the ground of fraud, it will be seen that the statute intended to secure the indefeasibility of the certificate, otherwise the recognised root of title might come to be regarded as a thing which required verification. Because if it could be set aside for fraud in hands of innocent persons, no such person could safely take a certificate without a thorough investigation into the whole title from the very beginning. That would defeat the whole scope of the Act. But section 126 is a complete answer to the plaintiff's case, so far as the German Club, the mortgagees, are concerned. Even in England, too, the Equity Courts protect innocent purchasers to some extent in cases of frauds by forgery—

Jones v. Bowles, 3 M. & Keen, 581.

The case of

Smith v. Brookbank, 7 Simons, 18,

is an additional authority on the question of parties. (GWYNNE, P.J.—On the question of fraud by forgery, the Act only provides for cases where the instrument is one “authorized to be signed” by some person. In the case under consideration, the testator had certainly not authorized the signing of any instrument. It should be undoubtedly a felony to personate another person for the purposes of the Act. That is so with reference to the local election law.) Again, it is admitted that the defendant Daniel Thomas Brady was entitled to half the proceeds of the sale of the land after the payment of £100 to the sisters, but the relief sought by the plaintiff would secure him not only the £250 from the German Club without consideration, but also his half of the land, and deprive the German Club of their security.

Belt, on behalf of the plaintiff.—I will take the three grounds of demurrer—want of jurisdiction, want of parties, and want of equity—in order. In the first place, the defendant's demurrer is bad in form, because it does not aver that there is no equity jurisdiction, and the defendant cannot demur *ore tenus* in reference to a point specifically taken. With reference to the jurisdiction of the Real Property Commissioners, it is a summary one, which will not oust the original equity jurisdiction unless specifically expressed to do so—

Attorney-General v. Mayor of Dublin, 1 Bligh,
N.S., 348

Goldsworthy v. Durrant, 2 De G., F., & J., 466

Slim v. Croucher, 1 De G., F., & J., 527

Gibson v. Ingo, 6 Hare, 112.

Further, where a certificate has been issued in the name of a non-existent person, the difficulties suggested in connection with the indefeasibility of the certificate do not arise. The plaintiff, also, rightly asks simply for the cancellation of the certificate, because, had he gone further and gone into the question of the administration of the testator's estate, the answer would have been that the German Club, the mortgagees, would not be affected by any such matters. The contention on behalf of the Club was that although the certificate might fail on the ground of fraud, yet the mortgage would be good, because it is distinctly protected by clause 126 of the Real Property Act. The plaintiff, however, only has to show such a fraud as would give the Court jurisdiction, and also that the Real Property Office tribunal would be unable to grant him relief. The application, also, by virtue of which the certificate of title has been issued is fatally defective, inasmuch as it alleges that Michael Brady is the occupant of the land, whereas the person mentioned was dead. It has been said, however, that the plaintiff's rights are barred by clause 20, but the answer to that is that there were no means by which the plaintiff could have known that it was the land in which he was interested that was being improperly dealt with. Again, the Registrar-General is to

issue a certificate to the applicant proprietor, but the applicant mentioned in the document put before the Real Property Commissioners by the defendant Michael Brady alleged that Michael was the applicant. The property, therefore, has not really been brought under the Act. It is contended that by section 33 the certificate to the defendant was conclusive; but the same objection, as to its being issued to a non-existent person, again meets the difficulty. Also, if the Act were strictly construed, the Court would have to say, following clause 34, that a dead man is the registered proprietor of the property in question. The fraud therefore, clearly took the transaction out of the Act. Clauses 40, 114, 115, 124, and 125, meet the point as to indefeasibility under clause 33. Then, as to the Registrar-General being a necessary party to the suit, it will be observed that he is the party deceived by the fraud, and therefore will not sit in judgment on the matter. Also if, as the plaintiff contends, the land really is not under the operation of the Act, the Registrar clearly has no jurisdiction. The Registrar's judicial power arises under clauses 135 and 136, but from an inaccuracy in the language of the former he can only summon a person before him to whom "a grant" has been issued, not a person holding a certificate. The jurisdiction, too, is purely a discretionary one, and therefore the defendants should have pleaded the want of jurisdiction, and averred that the Registrar-General was ready and willing to exercise his jurisdiction. The demurrer consequently is bad on that ground. (GWYNNE, P.J.—The Act provides that if the Registrar-General cannot effectually deal with a case when a wrong has been committed, he may apply to a Judge of the Supreme Court for assistance. No process, however, is given by which the Judge can exercise his judicial power.) I would point out further that the Registrar-General cannot give complete relief in the case before the Court by summoning the defendant Brady, a mortgage having been given. (GWYNNE, P.J.—The question has suggested itself to me, which of the two certificates which were drawn is to be considered original and paramount—the one bound up in the Real Property Office, or the one given to the owner of the land. It is not clear which would prevail in case of a variance between them.) It has been

said that the plaintiff has no *locus standi*, as he is not possessed of the land or such interest in it as would enable him to have the certificate of title cancelled under clause 137. (GWYNNE, P.J.—The clause referred to recognises the recovery of land at law or in equity, but the only method of recovering land at law is by an action of ejectment. Another clause of the Act, however, disallows actions of ejectment except in certain specified cases. A patent contradiction is involved in the two clauses.) I will next deal with the question of parties. The bill, as framed, does not require that any other persons should be brought before the Court. At any rate the defendants' demurrer is as bad, because they ask for several persons to be joined, some of whom are clearly unnecessary. The technical rule, therefore, comes in that a point on demurrer can not be good as to one part of it and bad as to another. There is a difference between a plea and a demurrer in that respect—

Daniel's Ch. Pr.

But the plaintiff only asks for a limited relief. There is no prayer for a reconveyance to the heir-at-law. All that the plaintiff wants is that the certificate of title may be set aside, and the matter placed as it was under the will. The question of parties is sufficiently dealt with in

Story's Equity Jurisprudence.

If the mortgagee has a remedy against the heir-at-law, the latter would undoubtedly have been a necessary party to the suit, but it is not so. The only essential parties to a suit are those interested in the subject in dispute—

Lewis's Principles of Equity.

With regard to the last question. As to the plaintiff having no equity, if the land were actually under the Act, the German Club as mortgagees might be protected under clause 126 of the Act, but the plaintiff claims that the certificate of title

should be set aside, and if the certificate fails, everything depending on it would also fail. The plaintiff and those in the same interest with him can have no claim on the Assurance Fund, and it is only such persons who are intended to come within Section 126 of the Act. On the question of fraud the following authorities have an important bearing:—

Kerr on Frauds

Story's Equity Jurisprudence

Bray v. Macdonald, 1 S.A.L.R., 20

Swansea Canal Company v. Great Western Company,

37 L.J., N.S., Ch., 238.

Boucaut, in reply.—The contention that the land is not really under the Act begs the whole effect of clause 126. The bearings of Sections 124, 125, and 126 of the Act are that the wrongdoer cannot set up the certificate as indefeasible, but an innocent mortgagee for value will be protected, the rightful owner being thrown back on his remedy against the Assurance Fund as to damages, although possibly he might recover from the fraudulent mortgagor the right to the equity of redemption. If the clauses were in any way contradictory the last of them would prevail, according to the well-established canon of construction. With reference to the form of the demurrer, it has been said that the defendant should have resorted to a plea, but pleas of necessity set up something which does not appear by the bill. A demurrer is different, and the defendant has strictly followed the rules of the Equity Act. The answer to the case cited as to jurisdiction is that they are inapplicable, on the ground that a new statutory remedy must be exercised under the Statute—

Martin v. Powning, L.R., 4 Ch. 356.

(GWYNNE, J.—As the estate at present stands, one fragment of the property is in D. T. Brady and another fragment in the German Club. *Quoad*, D. T. Brady—I think he ought to be deprived of his fragment. *Quoad*, The German Club—I am at present disposed to think they are protected.) On the question of want of equity and want of parties, the point arises, how can the Court enforce a decree to cancel the certificate in the public office against the

Registrar-General and Commissioners, who are not parties? As to the heir-at law not being a necessary party, it is clear he is an interested party, and the Court will not do more than declare rights where the owner of the legal estate is not before it. That would lead to a multiplicity of suits. (GWYNNE, J.—I cannot see that this heir-at-law would be prejudiced by the suit or is a necessary party.) As to the demurrer being bad in part, and therefore partially defective I cite

Wellesley v. Wellesley, 4 Myl. & C., 554.

Ingleby for the defendant, Daniel Thomas Brady, in support of the demurrer.—In all equity pleading where the contest is as to the real estate, there are two essential matters to be set forth by the plaintiff in his bill—first, the subject matter to which the plaintiff claims to be entitled; and secondly, his title to such subject-matter. That the first point is essential is clear, because the Court cannot make a decree unless it is plainly set out what property is in question. The plaintiff, however, has complied with the requisition. It is alleged that the plaintiff is entitled to one moiety of the proceeds of the land. But it does not appear what description of moiety is claimed, whether undivided or otherwise. That should have been stated—

Prideaux's Precedents of Conveyancing.

Then, again, what is the plaintiff's estate in the land? Is it a fee-simple, estate for life, or for a term of years? It may, for all that appears by the bill, be simply an equitable interest; but whatever it is, the rules of pleading require that it should be clearly defined. It is not competent for the Court to look at one paragraph to explain another; each allegation must stand by itself unless the two are definitely connected. A defendant is at liberty to take any one of two or more reasonable constructions which the wording of the plaintiff's bill will bear. But in any case the title to the land must be plainly set forth—

Lewis's Equity Draftsman

Houghton v. Reynolds, 2 Hare, 264.

Cur. ad. vult.

30 September—

GWYNNE, P.J.—Before *Mr. Ingleby* proceeds with his argument, I wish to remark that since the case was last before me I have considered carefully the effect of Section 126 of the Real Property Act, and I incline to the opinion that *Mr. Boucaut* is right in his contention that the effect of the clause is that even where property has been obtained by fraud, under the Act an innocent mortgagee of such property would be protected as against the real owner of the land. The doctrine is a very astounding one; but it appears that it was the intention of the new system of dealing with land. There is, however, another question which arises. Under the old law the relationship of mortgagor and mortgagee at one time existed between *Mr. Krichauff* and the defendant *Daniel Brady*, and inasmuch as the will of the testator had been registered, such mortgage would have been void. *Mr. Krichauff*, however, proceeded to prepare the necessary documents, and got the land brought under the operation of the new system. I do not impute *mala fides* to *Mr. Krichauff*; but in law he must be taken as having had knowledge of the existence of the registered will. The question therefore arises whether *Mr. Krichauff's* conduct was legally *bona fide*.

Ingleby continued his argument.—The case before the Court may be called an ejectment suit, its object being to obtain the possession or disposition of land. The subject-matter, therefore, has to be most distinctly set forth and strictly considered, more especially when a demurrer is filed—

Lewis on Equity Drafting

Mitford on Equity.

(GWYNNE, J.—I think it will hardly be contended that the third paragraph of the bill, taken alone, is technically satisfactory.) The Court then will have to see whether the first and second paragraphs remedy the defect; but in fact the paragraphs are in no way connected, and will have to be read and construed separately, and a defendant has a right to put up any construction on the language of the bill which it will legitimately bear—

Bothomley v. Squire, 3 Dr., 517.

The first paragraph of the plaintiff's bill refers to personal property, while the third deals with a question connected with realty, and there can be no possible similarity between the two allegations—

Vernon v. Vernon, 2 Myl. & C., 171.

The defendant therefore relies firstly, on the fact that there is a hiatus of nearly ten years between the date when the property was to be sold according to the testator's direction; and, secondly, that the plaintiff did not define the subject-matter, or show a sufficient title. The next point is that the Court is not the proper tribunal to deal with the case, the Real Property Office clearly having jurisdiction in the matter. Where a Statute is passed enacting a complete code in itself, and regulating proceedings under it, the Court will not interfere—

Mordaunt v. Mordaunt, 30 L.T., N.S., 657.

The Real Property Act, also, evidently intended that the certificate of title should be actually indefeasible except in certain specified cases, one of which is fraud. But clause 138 manifestly shows that the intervention of the Court is not necessary in such cases. If also the plaintiff has the legal estate, as appears from one part of his bill, he has his remedy under clause 124. (GWYNNE, P.J.—I think that the plaintiff's case may be collected from the whole of the allegations of the bill taken collectively.) Under Section 137 of the Act, too, the plaintiff has the means provided by which he could have secured the cancellation of the certificate of title if it were void. Clauses 124 and 137 are, in fact, in accord, for the former is the only one in the Act to which the latter can be construed as referring. (GWYNNE, P.J.—But you are assuming what the plaintiff denies—namely, that the land is under the Act. The plaintiff contends the whole affair is a gross fraud, and therefore void in every respect.) Although that has been the line of argument adopted by *Mr. Belt*, it is not the case made by the bill. The plaintiff should have framed his bill praying simply that he might be declared entitled to the land, and then a subsequent

SUPREME COURT.

BRADY V. BRADY AND OTHERS.

EQUITY.

application might have been made to the Court for an order directing the Registrar-General to Cancel the certificate of title. If the Court think that under clause 126 the mortgagees are protected, but still grant the prayer of the plaintiff's bill, the effect will be that the very basis of the mortgagee's title will be destroyed. Had the plaintiff, however, proceeded under Section 137, the Court could ultimately have decreed a proper and complete remedy by protecting what would, under the old law, be termed the equity of redemption. Again, if the plaintiff's contention be admissible, that the land is not under the Act by reason of the fraud which it is alleged has secured the issuing of the certificate, the effect will be to destroy the security which the Act intended to associate with a certificate as the root of title. As to the jurisdiction, the case of—

Henning v. Swinnerton, 10 Jur. N.S., 907,

is a clear authority against the plaintiff. The only other sections of the Act which bear upon the case are the 135th and 136th, which show that the Court has no original jurisdiction as to land under the Act, but only interferes on the application of the Registrar-General.

Belt, in reply.—I have on previous argument dealt with the question of jurisdiction. With regard to the question of pleading, it will be admitted that latterly there is not the same necessity as formerly existed for distinctive averments in respect of personal property and realty when the property passed under a will. As to the plaintiff not specifying what moiety of the land he claims, it will be observed that the bill avers that the plaintiff is entitled under a devise, and asks relief thereunder. Then, again, the first, second, and third paragraphs are clearly connected by the words "as hereinbefore contained." The clauses 124, 125, and 126 of the Real Property Act are those which have been most fully dwelt upon in connection with the case. (GWYNNE, P.J.—As to the first of those, I do not think it has anything to do with the matter.) That is what I intended to submit. "The fact of the fraud involved being one of forgery takes the case out of

SUPREME COURT. BRADY V. BRADY AND OTHERS

EQUITY.

the exceptions of clause 124. A fraud might simply have the effect of rendering a contract void, but a forgery cannot suppose any title whatever. Supposing that the original certificate of title were a forgery, and by some means registration was obtained, it can hardly be contended that it would operate to divest the real owner of his estate. Under the Shipping Law, which is analogous to the Real Property Act, mere registration does not constitute a title unless the instrument registered was a valid one—

Orr v. Dickinson, 28 L.J., Ch., 516.

(GWYNNE, P.J.—I understand the plaintiff's contention to be that there is no difference between a forged application to bring land under the Act and the supposititious case of there being no application at all.) Precisely. Then, with reference to clause 126, the simple answer is that the plaintiff contends that the property is not under the Act at all. Again, the probate of a will is the most solemn of all instruments, and will stand even against a certificate of title—

Ex parte Jolliffe, 8 Beav., 168.

But further, if there were no such person as the Michael Brady referred to in the documents lodged in the Real Property Office, such documents could not have been correct for purpose of registration as provided for by Section 107. On all grounds, therefore, it is submitted that the plaintiff is entitled to relief under his bill.

Cur. ad. vult.

27 October—

GWYNNE, P.J., now delivered judgment herein as follows:—This was a demurrer; and as the grounds of demurrer are numerous, I think it better to state the facts of the case as they appear on the bill before I consider the points raised by the demurrer. The bill states that the testator, Michael Brady, late of Gawler Plains, farmer, being seised in fee-simple in possession of a piece of land containing eighty acres, being the south-westerly

quarter of the section of land numbered 3239, situate in the Hundred of Munno Para, in the said province, duly made and published his last will and testament, bearing date the 27th of January, 1862, and thereby directed and bequeathed that the aforesaid land should be sold on or after the 27th January, 1864, and the amount be equally divided between the said testator's sons, the above-named defendant, Daniel Thomas Brady (therein called Daniel Brady), and the plaintiff (therein called Michael Brady), deducting, however, from the amount £100 to be equally divided between the testator's daughters, Ellen Kelly and Margaret Brady. The testator appointed Michael Freely and Thomas Brady executors of his will; that the testator died on June 10, 1862, and that the will was proved by the executors in this Court on November 19, 1862. Then comes this important averment—the will was registered on September 10, 1862, at the General Registry Office, Adelaide, No. 51, Book 186. The third paragraph of the bill, which was the subject of much comment by the learned counsel for Daniel Thomas Brady, runs thus:—"The plaintiff, Michael Patrick Brady (the plaintiff), is now entitled to one moiety or equal half part of the piece of land bequeathed by the testator, subject to the payment of the sum of £100 payable thereout to testator's two daughters, Ellen Kelly and Margaret Brady." The bill then goes on to state that the defendant Daniel Thomas Brady fraudulently suppressed the will of the deceased Michael Brady, and applied in the name of Michael Brady to the Registrar-General to have the land bequeathed by the will of the defendant Michael Brady brought under the provisions of the Real Property Act of 1861. The application is set out in the bill, but as it is in the usual form, I shall only notice the following parts of it:—"And I do further declare that I am not aware of any mortgage, encumbrance, or claim affecting the said lands . . . other than as set forth and stated as follows:—"That Frederick Edward Heinrich Wulf Krichauff, of Adelaide, agent, lent to me the sum of £250 sterling on the security of the said piece of land; and that I have agreed to execute and register a mortgage for the said sum to himself or to whom he may desire." The Registrar-General is requested to issue the certificate of title in the name of

Michael Brady, of Gawler Plains, farmer. The only title-deed handed in to the Registrar-General was a conveyance A. Watts and P. Levi, Esquires, to Mr. Michael Brady, dated 6th December, 1855. The application is certified as correct for the purposes of the Real Property Act by F. E. H. W. Krichauff, licensed land broker. The bill then states that a certificate of title was on the 7th of September, 1871, issued in the name of Michael Brady, of Gawler Plains, farmer; that on the same day the defendant Daniel Thomas Brady subscribed in the name of "Michael Brady" a memorandum of mortgage of the said land to the defendants, Der Deutsche Club, for securing the payment of £250 and interest. It does not appear why the name of Der Deutsche Club was substituted for the name of Mr. Krichauff, but probably he acted only as the agent of the Club. The bill then charges that the said certificate of title and mortgage are fraudulent and void, and ought to be cancelled by the decree of this Court. The prayer for relief is in these words:—"That the aforesaid certificate of title entered in the Register-book, vol. 158, fo. 18, and the aforesaid memorandum of mortgage, registered No. 36,462, may respectively be declared absolutely void and inoperative, and may be ordered by this Court to be cancelled." There is also the prayer for general relief. Now, for the purposes of this demurrer, the facts stated in the bill are admitted to be true, and in a few words they amount to this. A father dies leaving a will by which he desires that his farm shall enure to the benefit of his four children. One of those children, by name Daniel Thomas Brady, possesses himself of his late father's title-deeds, personates his father, and by means of perjury and forgery obtains from the Real Property Commissioners a certificate of title. He then mortgages the property to the German Club; and this takes place, notwithstanding the will of the deceased Michael Brady was duly registered under the Local Act No. 8 of 5 Vict.—a registry under the management and guardianship of the Registrar-General, and in the same department as the Real Property register. I have no means of judging as to the sufficiency or otherwise of the evidence which induced the Real Property Commissioners to order this land to be brought under the new system. No doubt they caused the old register (that established

by No. 8, 5 Vict.) to be searched, and no doubt they had what seemed to them unquestionable evidence before them of the identity of the applicant. They were, however, deceived. Now, I am told that such a transaction as I have portrayed (the plaintiff's case) is protected, and at all respects as regards the mortgage to Mr. Krichauff or Der Deutsche Club, under the 126th section of the Real Property Act, 1861. That assertion assumes that Daniel Thomas Brady was a registered proprietor of the land in question, and that Mr. Krichauff or Der Deutsche Club was a mortgagee, *bona fide* for valuable consideration. As to the question as regards the *bona fides* of the mortgagees, it becomes unnecessary, from the view I take of the case, to consider it. But as regards Mr. Krichauff, the application states him to have been a mortgagee, that is, before the land was attempted to be brought under the new system, and whilst it was under the law of England as accepted in this colony. But that could not lie, as the defendant had only a partial interest in the land, and it is a great principle of English law that a man cannot give or grant that which is not his own. It might be said, however, that Mr. Krichauff acted under the *bona fide* belief that Daniel Thomas Brady was the absolute owner; but still he was bound to have searched the register established under the old system for the protection of persons like himself dealing under the old system with land under its rules, and he was bound, if he had not a personal knowledge of Daniel Thomas Brady, to have required proof of his identity with the person (Michael Brady) who took as purchaser from Messrs. Watts & Levi. But if he acted so negligently in the matter as to take all for granted, I doubt whether that negligence would not exclude him from the class of *bona fide* mortgagees, even under the new system. The difference between a person attempting to avail himself of the new system for the purpose of mending his position with respect to a right obtained under the old system and a person who initiates a transaction under the new system is obvious. As I have above said, I do not think it necessary on the present occasion to decide the question of *bona fides*, and far be it from me even to insinuate that Mr. Krichauff acted in the matter in anywise improperly other than is implied in legal negligence, for I do not believe he

SUPREME COURT.

BRADY V. BRADY AND OTHERS.

EQUITY.

did. At the same time, I must be allowed to doubt whether he got rid of the consequence of that negligence which attached to him in relation to the land when under the old system by consenting and assisting to bring it under the new; for it is a principle of law, *culpa lata æquiparatur dolo*. For the purposes of this demurrer, however, I assumed both Mr. Krichauff and the Club acted in good faith—in the words of the 126th section, that they, or one of them, were or was a mortgagee or mortgagees *bona fide* for valuable considerations. I now turn to the question—Was Daniel Thomas Brady a registered proprietor? and I am compelled to say that in my opinion he was not. The mode of bring land under the new system is prescribed by the 14th, 15th, 16th, 17th, 18th, 19th, and 20th sections of the Real Property Act, 1861. The Registrar-General is to receive the application; he is to cause the title of the applicant to be examined and reported upon by the Solicitors, and is then to refer the application with the Solicitors' report thereon to the Lands Titles Commissioners for their consideration. The Commissioners may reject such application always, or give directions to bring the land under the new system. If the Commissioners decide in favour of the applicant, the Registrar-General must bring the land under the Act by issuing to the applicant proprietor a certificate of title. I am not informed as to what, in the present case, was the Solicitors' report, nor am I aware of the nature of the procedure used by the Lands Titles Commissioners in exercising their judicial functions. It appears, however, that their decision was in favour of the applicant, and that decision, I take it, is to be regarded in the nature of a judgment. The Commissioners, no doubt, would look at the application; they would look at the title-deeds lodged at their office by the applicant, and then they would decide (upon what evidence I cannot say) that the applicant was the Michael Brady who took the land by purchase from Messrs. Levi & Watts, and accordingly they directed the Registrar-General to bring the land under the provisions of the Act. Now, it is to be borne in mind that the person whom the Commissioners really ordered to be registered as a proprietor was no other than the deceased Michael Brady, of Gawler Plains, farmer, whom they were induced to believe the

defendant D. T. Brady was. But they have no power to register a dead man except in the case provided for by the 27th section of the Act; but in this case the applicant did not die in the interval between the date of the application and the date appointed for the certificate of title to issue, but he died on the 10th of June, 1862, and the application was made on the 18th day of July, 1871. It appears to me, therefore, that the decision or direction of the Commissioners, being obtained by fraud of the basest description, was a mere nullity, and, consequently, Daniel Thomas never was a registered proprietor. The determination and direction of the Real Property Commissioners cannot be put higher than a judgment at law or a decree of this Court, and there is no doubt that such a decree or judgment if obtained by fraud would be set aside. "Fraud," says Lord Chief Justice DE GREY, "vitiates the most solemn proceedings of Courts of Justice."—State Trials 21, Duchess of Kingston's case. I have thus answered both the demurrers so far as relates to the points argued, and my judgment proceeds upon this ground, that the registration and the certificate of title were procured by fraud, and were, therefore, mere nullities, and that the mortgage being based upon the registration, and that foundation being removed, the mortgage falls with it. I will now proceed to the several other causes in the order in which they are put by the respective defendants. And first, as respects the demurrer of Der Deutsche Club. These defendants say that the plaintiff has an effectual and complete remedy at law, or by an application to the Registrar-General, as provided by the Real Property Act, 1861. I confess that I can see no weight on this ground for supposing the plaintiff had the remedies referred to; still, this Court has concurrent jurisdiction in cases of fraud, and I have already said that in the case now before me fraud is the ground made for the interference of this Court. Then it is objected that there is a want of parties to the bill, and it is suggested that the personal representatives of the testator and his heir-at-law should have been made parties, and also that the Real Property Commissioners should. But it appears to me that these objections arise from a total misconception on the part of the learned counsel for the defendants of the case made by the

plaintiff's bill. No doubt all parties interested in the subject-matter should be parties to a bill affecting that subject-matter, but that means the subject-matter of controversy only; and here the controversy is only part of a longer subject-matter. The plaintiff does not ask the Court to declare the rights of the parties as between themselves, or as against the heir-at-law, or the executors of the testator. But he says frauds have been attempted by the defendant D. T. Brady, by which my title to certain land is prejudicially affected. I undertake to establish that fraud, which, however, for the present purpose is admitted, and I ask the Court to restore me to my former situation, whatever my rights may be under my father's will. I cannot see, therefore, how the interest of the heir-at-law or the executors would be affected by the decree. Whether the executors had an implied power to sell the section is a question of some doubt. According to the decision of Sir John LEECH, in *Bentham and Another v. Wiltshire*, 4 Maddok, 44, the executors would not have such power, as here the executors have nothing to do with the produce of the sale, nor any power of distribution with respect thereof. And so seems to me the authority of Sheppard's Touchstone, p. 43. But on the other hand, see *Ward v. Devon*, cited in *Forbes v. Peacock*, 11 Sim., 160, in which the decision in *Bentham v. Wiltshire* and *Page v. Adam*, 4 Beavan, 269, are disapproved of. And also see *Curtis v. Fulbrook*, 19 L.J., N.S., Eq. 65. I am not, however, for the purposes of this demurrer, compelled to decide this point, and I, therefore, forbear to do so. As to the making the Real Property Commissioners parties, I think the objection altogether groundless. There are other grounds of demurrer assigned, but as I think they arise from the misconception of the scope and object of the bill, I leave them alone as being unworthy of further observation. And as respects the demurrer of the defendant Daniel Thomas Brady, I have already in my observations on the demurrer filed by Der Deutsche Club, as it seems to me, answered them, except the fifth and eighth points; and as to these, I am of opinion that the plaintiff complies with the rule. He has stated with sufficient certainty and particularity to enable the defendant to meet the case upon some definite issues. The statement of the bill as to

SUPREME COURT.

BRADY v. BRADY AND OTHERS.

EQUITY.

this I have above set out, and it is unnecessary to repeat it. It would be competent for the defendant on that statement of title to take issue on the fact that the testator was seised in fee-simple of the section in question, or that he duly made his will, or that he directed and bequeathed that the land should be sold, or that the amount should be divided amongst his four children. The case of *Houghton v. Reynolds*, 2 Haro 264, was cited by the learned counsel on behalf of the defendant D. T. Brady, but that case only decides that a positive averment of a positive title in the plaintiff as a devisee is sufficient, notwithstanding the bill only alleged that the devisee, being or claiming to be seised or otherwise well entitled, devised the estate to the plaintiff, and I do not think that case aids the defendants' contention. In my opinion, the first paragraph of the bill taken alone states the plaintiff's title with sufficient certainty to comply with the rules of equity pleading. As to the third paragraph, it appears to me to state merely an inference of law, and, perhaps, that inference, although substantially correct, is not as technical and precise as it might have been. The title of the plaintiff is derived from his father's will, and is so stated in the first paragraph, and I do not think that anyone would be misled by the third paragraph into supposing that it was intended to rely upon another and a different title. What is once shown to exist is presumed to continue until something is shown to turn the course of events away. I, therefore, will regard the third paragraph as pardonable surplusage or, at all events, a mistaken inference of law, by which the plaintiff is not bound. I am of opinion that both demurrers must be overruled, and with costs.

Demurrers overruled.

SUPREME COURT. { GOLDEN REEF MINING COMPANY, } EQUITY.
 LIMITED, **EX PARTE** WARD. }

GWYNNE, PRIMARY JUDGE.]

[EQUITY.]

29 SEPTEMBER, 6 AND 13 OCTOBER, AND 17 NOVEMBER, 1874.

IN THE MATTER OF THE COMPANIES ACT, 1864, AND OF THE
 GOLDEN REEF MINING COMPANY, LIMITED, **EX PARTE** WARD.

*COMPANIES ACT, 1864.—Compulsory Winding up—Failure to
 prosecute objects for which formed—Qualification of Directors
 —Bonâ Fide Subscription for Shares.*

*The Memorandum of Association of a Company purporting to be
 started for the purpose of purchasing and working certain
 claims specified in the prospectus provided, amongst other
 things, that the Company was to be considered formed as
 soon as 15,000 shares should have been applied for, and that
 applicants for shares should pay 2s. 6d. per share on applica-
 tion and 5s. on allotment. Fourteen thousand shares only having
 been applied for, one of the promoters sent in applications on
 behalf of persons in the Northern Territory for (in all) 1,000
 shares, but on these shares no money whatever had been paid,
 and thereupon the Company was treated as formed, nor was there
 any evidence that such promoter was authorised so to apply.*

*The Memorandum of Association further provided that the pro-
 moters should receive 7,500 fully paid-up shares, but these shares
 were in fact never allotted.*

*The Articles of Association provided that every Director should be a
 holder of at least 100 shares.*

*Subsequently to its formation, as above, one of the promoters was
 appointed Director of the Company, basing his qualification on
 his claim to the unallotted shares above mentioned.*

*Machinery was purchased for the purpose of carrying on the neces-
 sary mining operations, but before anything was done it was found
 that the information on which the prospectus was issued was in-
 correct, and the claims specified in the prospectus were never
 transferred to the Company. The machinery was accordingly
 sold, and the only object which the Company proposed to effect
 by continuing in existence was to prosecute an action against the
 Northern Territory promoters for fraudulent misrepresentation.
 More than one year had elapsed between the time when the
 Company was first started and the filing of the petition for
 compulsory liquidation.*

*Held—1. That the 15,000 shares had never been bonâ fide sub-
 scribed for, and the Company therefore never legally formed.*

*2. That the appointment of the promoter as Director was a nullity,
 he not possessing the necessary qualification.*

Q

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, } LIMITED, EX PARTE WARD	EQUITY.
----------------	---	---------

Directors' qualification was fixed at 100 shares. One of the Directors was Mr. Alfred Watts. The petitioner held forty shares in the Company. The petitioner alleged that in consequence of a difficulty being experienced as to the 15,000 shares which were to form the basis of the Company not being taken up, Mr. Watts applied, as agent for Messrs. F. and E. Deacon and Mr. McCallum, for 1,000 shares, by which means the requisite number was made up; that the Company had never attempted to legitimately prosecute gold-mining operations, and that, although a proposed voluntary liquidation had not been carried out, owing to the advice of the solicitor of the Company, yet the majority of the shareholders would be in favour of a liquidation; that on the whole the conduct of the promoters demanded an investigation. The petition contained a number of allegations tending to impeach the *bona fides* of the promoters, but which were not material to the grounds upon which the decision was based. The petitioner prayed a compulsory winding up under the Companies Act.

Way, Q.C., in support of the petition.—The winding up of Companies is provided for by Section 75 of the Act of 1864, and the petition relies upon subdivision 5, which enacts that a compulsory liquidation may be granted whenever in the opinion of the Court it is just and equitable that a Company should be wound up. That gives a large discretion, but the law has been well settled by the decisions in England on the point. A Company has the option of winding up voluntarily, but the respondent has not chosen to adopt that course. Being, in fact, a bubble venture, it has elected to remain in existence for the ostensible purpose of carrying on a lawsuit against the alleged fraudulent promoters in the Northern Territory. The petitioner, however, and others decline to assent to such a procedure, relying upon the English authorities that where there are circumstances demanding an enquiry they are entitled to ask the Court to interfere—

In re Berlin Great Market Company, 19 W.R., 793

In re West Surrey Tanning Company, L.R., 2 Eq., 737

In re Suburban Hotel Company, L.R., 2 Ch., 737.

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, } { LIMITED, EX PARTE WARD. }	EQUITY.
----------------	--	---------

Another ground taken by the petition is that the Company was a bubble one. That was admitted by the shareholders when the voluntary liquidation was contemplated, and confirmed by the report of the Company's own agent, Mr. Robertson. The petition therefore, is entitled to succeed on account of the concern being a bubble—

In re London and County Coal Company, L.R., 3 Eq., 355

In re Anglo-Greek Steam Company, L.R., 2 Eq., 1.

It will be suggested that even if the facts disclose sufficient grounds for a compulsory liquidation, yet the wishes of the majority of the shareholders should be considered. (GWYNNE, P.J.—I take it if the petitioner were the only dissentient the Court would act.) Yes—

In re Great Northern Copper Mining Company of Australia,
17 W.R., 462.

In some cases, where the Company is a small one, the Courts prefer leaving it to settle its affairs in the least expensive way; but it has been decided that there is jurisdiction to order a compulsory liquidation even where there are only a few shareholders and no debts whatever—

In re Sanderson's Patent Association, L.R., 12 Eq., 188.

The petitioner, however, chiefly relies upon the misrepresentation in the prospectus, that these facts disclose a case for enquiry, that the concern is altogether an abortive one, and that a Company cannot exist merely for the purpose of litigation, which may be much more satisfactorily prosecuted when the Company is under the control and direction of the Court.

Ingleby, on the same side.—I will assume, as shown by the resolution carried by the shareholders, that a majority of the members were at one time willing that the Company should be liquidated, but now they are not; that the reason for the pro-

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, } LIMITED, EX PARTE WARD.	EQUITY.
----------------	--	---------

posed winding up has been that the shareholders discovered they had a worthless property; that the specimens which came from the Northern Territory were not taken from the property, as alleged; and that there was not, as was said, four parallel reefs. Assuming such facts, it is clear that the petitioner has a right to ask for a liquidation. It will hardly be disputed that the Company had not a *bond fide* existence, the main contention being as to whether the Company can be continued for the purpose of carrying on a lawsuit. But that is, in fact, one of the strongest arguments in favour of the proposed winding up by the Court. Assuming that the promoters have not received the money for which they sold the claims, it will clearly be better to wait until some action is taken by them before legal proceedings are resorted to. The next point is as to whether the Company has ever been properly formed for business purposes. Under the memorandum of association 15,000 shares was the minimum upon which the Company was to be floated; but it was alleged that Mr. Watts had, with the view of getting the concern started and the money consideration paid to the promoters, put in a sham application for 1,000 of the shares. Assuming that the persons whose names were used in connection with such 1,000 shares had never given any authority in the matter, or paid the necessary 2s. 6d. per share on application, then the shares have not been properly allotted. That is another matter for investigation by the Court; and even if they had agreed that the amounts due in respect of the shares should be deducted from the bonus coming to them, the circumstance is a gravely suspicious one.

Attorney-General (Mann), for the Company.—The Company deny the allegation that the venture was a bubble one within the meaning of the decided cases. Although, also, the Court has a very extensive discretionary power as to compulsory liquidation, yet it will consider the wishes of the majority of the shareholders; and in the case under consideration by far the larger number of the members are opposed to the petition. As to the alleged irregularity in the formation of the Company, that would be no ground for asking for a winding up, although it might be urged

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, } LIMITED, EX PARTE WARD.	EQUITY.
----------------	--	---------

as a reason why a person should have his name removed from the register of shareholders.

Cur. ad. vult.

6 October—

Attorney-General (Mann) continued.—It is only pretended that the application for winding up comes within the proviso for liquidation when the Court decides such liquidation would be “just and equitable.” It will be seen from the memorandum of association of the Company that its objects are of a most comprehensive nature, not being in any way confined to mining the six claims on which the venture was originally formed. The promoters also have not received any portion of the £3,000 cash or any of the shares as agreed in consequence of the alleged fraud; but the Company are hampered by their liability under the agreement, and therefore are desirous of setting such agreement aside in Equity. When that has been done there will remain a capital of about £10,000, with which, if the shareholders feel so disposed, gold mining operations in the Northern Territory may be prosecuted. It is clear, therefore, from the very case cited on the other side,

In re The Suburban Hotel Company (ante),

that under such circumstances there is no necessity for a liquidation. In that case the Company had power to carry on several hotels. One had been started and proved a failure, and it was then asked that the venture might be wound up; but Lord CAIRNS pointed out that where such extensive powers were possessed the Company might be carried on as long as there was any capital available. In the case before the Court, even if the promoters were paid their £3,000, there would still remain £8,000 actual capital and a power to increase. But it has been said that the Company is a bubble one. What is legally understood by a bubble Company is one which has been projected by fraud, and has no actual foundation or existence. That cannot be said of the venture the subject of the petition. On the contrary, the Directors are in the same position as the other shareholders, having invested their money in

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, LIMITED, EX PARTE WARD. }	EQUITY.
----------------	--	---------

the concern, and to a much larger extent than Mr. Ward has done. All the cases cited on the other side as to bubble ventures refer to Companies where the parties forming and carrying on the concern had acted fraudulently. The prospectus provided that the promoters were not to have their money until the claims had been transferred, but after the inspection of the claims by the agent of the Company the Directors declined further proceeding under the agreement. In the case

In re Berlin Great Market Company (ante),

the compulsory order for liquidation was granted on account of the misconduct of the Directors; in fact, all the reported cases go on that or some similar ground. But in the case before the Court the governing body of the Company were those who had the largest interest in it, and no suggestion has been made of *mala fides* on their part. In

Haskew's case (ante),

the application was simply to procure the removal of a name from the register of the Company, and if the petitioner had adopted that course when he discovered the supposed fraud there might have been some ground for his asking to be relieved from his liability. It has been assumed, too, on the part of the petitioner that if grounds were shown which would justify the Court in making an order for the winding up, the question of what is the feeling of the majority of the shareholders will not weigh with the Court; but the authorities show that the wishes of the members of a Company are always carefully considered—

In re Langley Mill, Steam, and Iron Company, L.R.,
12 Eq., 26,

in which case the petition was by a creditor, and the Company had ceased operations and become insolvent. The petitioner is the holder of forty shares, on which he has paid an allotment call of 2s. 6d. per share. The question is whether the Court will allow

SUPREME COURT. { GOLDEN REEF MINING COMPANY, } EQUITY.
 LIMITED, EX PARTE WARD. }

Mr. Ward to obtain an order in direct opposition to the wishes of the general body of the shareholders. It is well established that no order will be made where a petitioner acts in bad faith—

Metropolitan Saloon Omnibus Company, exp., Hawking, 28
 L.J., Ex. 201.

It will be remembered that the shareholders have passed the preliminary resolutions for a voluntary liquidation, but that on the advice of counsel that it would be better first to try the question of the *bona fides* of the Northern Territory promoters the resolutions were not confirmed. At the meeting which decided on following the legal advice Mr. Ward was present, and actively supported the idea. Subsequently, however, without in any way communicating with the Directors, and ignoring the fact that he had agreed to assist and indemnify the management in their exposure of the supposed fraud, the petitioner filed his petition. Had he first seen the Directors and told them that, having gathered further information, he had decided that it would be better to wind up, then if the Directors declined to act he might have applied to the Court with some grace. The Court also will consider the fact that a large number of shareholders holding 7,000 shares expressly state their desire that the Directors should oppose the petition. Mr. Ward has alleged that he acted with other shareholders, but the Company defies him to name a single member of the venture besides himself, excepting Mr. Wood, who has paid his allotment call, who supported the petition. As to the view of the majority not having any weight, the case of

Re West Surrey Tanning Company (ante)

has been cited, but there the bulk of the shares were held by one person, who had previously owned the property, and it was of course to his interest that the other shareholders should go or paying their calls; but it being apparent that he was not acting *bona fide* the Court granted a compulsory liquidation. Even the misconduct of the Directors of a Company is not a ground for liquidation—

Anglo-Greek Steam Company (ante).

SUPREME COURT. { GOLDEN REEF MINING COMPANY } EQUITY.
 LIMITED, EX PARTE WARD. }

But, further, the petitioner has contracted to pay £1 per share on his forty shares towards the capital, and the remaining shareholders are entitled to ask that such contract should be carried out, unless it be set aside on the ground of fraud. It has been said that if litigation as to the Northern Territory promoters were necessary, it could go on just as well after liquidation as before; but it will be observed that, after the order for winding up has been made, the official liquidator will have at once to call up the full amount owing on the allotted shares, so that if the suit against the Northern Territory promoters failed funds would be available to pay the £3,000 to which they would be entitled. If there were a winding up, therefore, in any case the members of the Company would lie out of their money paid up in calls during the equity proceedings. But the great distinction to be noticed in connection with the whole case is—that no fraud against the shareholders is charged, the management suffering with the other members if the fraud were as supposed. It is confidently asked on all the grounds previously set forth that the petition should be dismissed and with costs.

Now, Q.C., on the same side.—The first point is, has the plaintiff made out a case which, supposing he acted in good faith, entitles him to the order asked for. It is not unimportant to consider that the petition was filed within a year of the formation of the Company, and that the memorandum and articles of association provide a means by which the shareholders can wind up when they deem it advisable to do so, and the Courts never so favoured liquidation as to interfere with the wishes of the majority which has to sanction a winding up—

Hop and Malt Exchange Company, L.R., 1 Eq., 483.

Mr. Robertson has reported the claims to be valueless; but Mr. Bowls, manager for the Company, says there are four reefs on the property, although they are not gold-bearing at the surface, and another mining captain says the claims are valuable, while the Northern Territory promoters still insist that the property is a

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, } LIMITED, EX PARTE WARD.	EQUITY.
----------------	--	---------

that the Company would be considered formed when 15,000 shares had been allotted, and the object of the limitation was to secure a fair assurance of sufficient capital for floating the Company. The shareholders, therefore, had a right to expect that 15,000 half-crowns would accompany the applications for the 15,000 allotted shares. But the fact was that on a great number not a sixpence had been paid. The amount payable in respect of the 1,000 taken up by Mr. Watts for the Northern Territory promoters was to have been deducted from the money coming to them in respect of their interest in the claims; in fact, the application was conditional on their property being purchased from them. (GWYNNE, P.J.—Then you say that the Company was never legally formed?) Yes. The contract between the promoters and the public was that £15,000 were to be *bona fide* launched in the venture. Not one of the 1,000 shares applied for by Mr. Watts has been put upon the Company's register. The Company, then, never having been legally formed, can only be wound up compulsorily. There is no other means of liquidating it. The broker and his clerks were shareholders, and also the attorney. None of them paid anything in respect of their shares, the solicitor simply arranging that his liability should be a partial set-off to his claim for costs. That the property of the Company was worthless is clear from the Attorney-General's own affidavit, in which he states that on the claims being found to be valueless a meeting of shareholders was called, and it was at first thought best to wind up the Company voluntarily. In face of that concession, however, it had been solemnly argued that there was no proof that the Company had a valueless property. In Mr. Watts's affidavit, also, it was alleged that on discovering that the claims were worthless a telegram had been sent to Mr. Deacon, in which it was said that the Golden Reef Company had decided to rescind the agreement with the promoters on the ground of fraud; and then Messrs. Watts and Wright added—"We cannot take further part in this matter; you must use your own discretion." The fact was the bubble had burst and the fraud was discovered. The promoters then preferred "passing by on the other side" to assisting in the exposure of the gross imposture. The next point is that the Company has

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, } LIMITED, EX PARTE WARD.	EQUITY.
----------------	--	---------

never carried on business. The respondents reply that between £3,000 and £4,000 has been expended in the purchase of machinery, and that work is being “energetically” carried on. But the truth is that even the machinery has since been disposed of to two Companies for £800 on promissory notes, and one of such Companies is now in liquidation, and the mere wasting of money on machinery did not constitute the legitimate working of a gold Company. The Court will also regard the statements in the petition as evidence until they are disproved—

Companies Act, 1864, Schedule 6, Rule 4, p. 101.

That the petitioner charges that the venture is a bubble one; by which is to be understood a Company formed not for the benefit of the public, but for the purpose of transferring money into the pockets of the promoters without any just consideration. The affidavits of Messrs. Watts and Wright and of the Attorney-General concede that the venture did not bear out the original representations which had been made respecting it, and it was hardly possible to conceive of any undertaking which could be more correctly designated a bubble. The next question is as to the subject-matter of the Company being gone. (GWYNNE, P.J.—I do not think you need trouble yourself with that point, as it has been admitted that the only idea in continuing the Company is to carry on a lawsuit against the Northern Territory promoters.) The fourth ground relied on in the petition is that there are circumstances in connection with the formation of the Company which require investigation. If the Company has been conceived in fraud, and its mode of management demands enquiry, surely the claim for investigation had been substantiated; and the evidence justifies both presumptions. The benefit of a compulsory liquidation is that the official liquidator is an officer of the Court, and has power of bringing persons before it; and in addition, the compulsory liquidation affords all kinds of facilities for investigation.

Curr. ad. vult.

17 November—

GWYNNE, P.J., now delivered judgment as follows:—Under the Companies Act certain grounds are set out as sufficient to justify

SUPREME COURT	{ GOLDEN REEF MINING COMPANY, } LIMITED, EX PARTE WARD.	EQUITY.
---------------	--	---------

the making of an order for liquidation. The only one of such grounds which is at all vague is the one which permits the granting of an order when the Court thinks it "just and equitable" that a Company should be wound up. On this point it has been held that the Court should consider whether, in an application under the section in question, any grounds have been set up in any way *ejusdem generis* with those which the law provides should give an indisputable right to a compulsory liquidation. An undoubted ground for a compulsory winding up is where the business of the Company has not been commenced, or has been suspended during the space of one year. I think the situation of the Company before the Court is *ejusdem generis* with that provision. There is the positive evidence of Messrs. Robertson and Bowls that, substantially, no work whatever has been done on the claims, and it has been admitted by the learned Attorney-General that there is no intention of carrying on legitimate mining operations. In fact, it appears that the Company has failed altogether. *The Metropolitan Hotel Company's* case, and the other authorities which have been relied upon on behalf of the Company, are clearly distinguishable from the one under consideration. In the case before the Court the basis of the Company was the obtaining of six particular claims in the Northern Territory. The Company, however, could not acquire them; and, at a public meeting of the shareholders, the whole affair was characterized as a swindle. So that although one year from the incorporation of the Company had not expired before the petition was filed, yet it was over one year since the Company had been started, and nothing in the way of actual working had been done. The judgment of the Court is grounded simply on the fact that the Company has collapsed, and altogether failed. As a matter of fact, too, the 15,000 shares which were to form the basis for starting the Company have never been legitimately subscribed for. Through the ordinary channels the promoters found they could not get a sufficient number of shares taken up, and then by an underhand manoeuvre the requisite number was made up. Mr. Watts was said to have taken 500 of the shares, but he never really did so. I therefore think that none of the shares in the Company have been properly allotted.

SUPREME COURT.	{ GOLDEN REEF MINING COMPANY, }	EQUITY.
	LIMITED, EX PARTE WARD.	

Mr. Watts was at one time a Director of the Company; but it is doubtful whether he could ever have held the 100 shares necessary under the Articles of Association to qualify him for that position. The Company, then, has failed; the subject-matter has not been obtained, and the whole venture consequently falls to the ground. I have come to the conclusion that the sooner the Company is annihilated the better.

Order as prayed, with costs.

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 { EXPARTE JOHN HINDMARSH. }

GWYNNE, PRIMARY JUDGE.]

[EQUITY.

19 OCTOBER AND 17 NOVEMBER, 1874.

IN THE MATTER OF THE DISTRICT COUNCILS ACT, 1858, AND THE
 DISTRICT COUNCIL OF GLANVILLE, EXPARTE JOHN HINDMARSH.

*DISTRICT COUNCILS ACT, 1858, Section 186.—Order for Sale
 of Land—Primary Judge—Exparte Application.*

*Under Section 186 of the District Councils Act of 1858 the Primary
 Judge has jurisdiction to order land to be sold for payment of
 arrears of rates, and such order may be properly made on an
 exparte application.*

*Even where there is a reputed owner of the property sold, the notice
 of intention to sell required by the Act may properly be addressed
 "To all whom it may concern;" and where several distinct prop-
 erties are intended to be sold it is not necessary to address a sepa-
 rate notice in respect of each property, but one notice only, with a
 schedule of the properties affected and the particulars required by
 the Act with regard to the same, so far as known, is sufficient.*

THIS was application by Mr. John Hindmarsh, of Victor Har-
 bour, gentleman, to set aside an order of the Supreme Court for
 the sale of Harbour Allotment 6, Port Adelaide, for non-payment
 of rates. The application was first made to the Primary Judge
 on summons in Chambers, and by him referred to the Court.
 The points relied on in support of the application were:—That
 the Court of Equity had no jurisdiction to make the order for sale
 of the land; that the order was bad by reason of its having been
 made *exparte*; that the petition and affidavit on which the order
 was made did not show that the conditions precedent to the
 making of such order had been complied with; that on the merits
 the order should not have been made.

The evidence given on affidavit was that Mr. Hindmarsh had
 through inadvertence paid rates upon Harbour Allotment 7. On
 discovering that proceedings were being taken by the District
 Council, he saw the clerk and offered to pay all rates and costs
 due on his Allotment 6. The clerk, however, referred Mr. Hind-
 marsh to the solicitor of the Council, as proceedings had been
 taken to sell land on which there were arrears of rates due. The

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 { EX PARTE JOHN HINDMARSH. }

reputed owner of Allotment 6 was a Mr. Eusebius Coles. Shortly after wards the applicant left the colony, and was absent in New Zealand for some months, during which time the land was sold.

Attorney-General (Mann) in support of the application.—It may be suggested that the Court has already decided the first point in previous applications which have been made to the Court in reference to the sale of land by the same District Council ; but in the cases referred to the point has only been raised by a doubt expressed by the Primary Judge, and has never been really argued. But it has been held that, although not less than nineteen orders have been made by nine different Judges under a Statute, that does not preclude the question of jurisdiction being raised—

Hammersmith Rent Charge Case, 19 L.J., Ex. 66,

It may also be contended that, although the order has been made by the Primary Judge, it was done as by a Judge sitting at Common Law—not by virtue of his special jurisdiction when presiding over the Equity Court ; but the answer to that is that all the proceedings were entitled as in Equity and endorsed by the Chief Clerk. If it had only been intended to invoke the power of one of the Judges, the petition would not have been addressed to three Judges as it was. The order for sale has clearly been made by the Court in its equitable jurisdiction. and such jurisdiction has been improperly exercised. The Act of 1868 provides that in cases in which a District Council wishes to sell land on account of non-payment of rates an application is to be made to “the Supreme Court or a Judge thereof.” That Act preceded the Equity Act, and the intention was clearly that the Common Law jurisdiction of the Court should be put in motion. But then the question arises as to whether, even supposing originally the power was a Common Law one, the passing of the Act did not invest the Primary Judge with the jurisdiction. The only point is whether the jurisdiction under the District Councils Act is “similar or analogous” to any jurisdiction exercised by the Courts of Equity in England within

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

the meaning of the Equity Act. The only analogous statutory power I have been able to discover is that under Section 81 of 6 & 7 William IV., cap. 71, which enabled a person entitled to a rent charge, if it were in arrear for forty days, to cause an inquisition to be issued. That, however, was done at Common Law. It is therefore submitted that the statutory jurisdiction by virtue of which the applicant's land was sold in no way came within the words "similar or analogous" in the local Equity Act. The next point is, that even had the Primary Judge jurisdiction, it could not be exercised *ex parte*. It is a well-established principle of law that a man could not be condemned before he had been heard—

Broom's Legal Maxims.

(GWYNNE, J.—I think the local Legislature has hardly shown a sufficient reverence for that principle in the Act under consideration.) In a penal Act the Court will always construe strictly against the person endeavouring to take the benefit of the Statute. In

Capel v. Child, 1 L.J., N.S., Ex. 205, 2 Cr. & J., 558,

it was distinctly held that under a special Statute the Court cannot make an *ex parte* order. There a Bishop had nominated a curate without hearing the incumbent of the parish, and the Court held that the appointment was invalid. It is only common justice that where an order is to be obtained, which amounts to a judgment of the Court, depriving a man of the fee-simple of his property, the owner of the land should first be heard. In the Hammersmith case (*ante*) the decision in *Capel v. Child* was commented upon and followed as to the principles, but the Court pointed out distinguishing points which took the case before them out of that judgment. The distinction was that under the Statute in question in the Hammersmith case the judgment was not final. With regard to the District Council clearly having an *ex parte* power of leasing lands on which there are arrears of rates, it will be seen that the Councils can only create a tenancy from year to

R

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE EXPARTE JOHN HINDMARSH. }	EQUITY.
----------------	--	---------

year, and therefore the owner of the fee is not seriously damnified. The applicant is also entitled to succeed on the merits, as he has offered to pay all arrears. But, whatever may be the case when the owner of land is unknown, it is clear that where there is an owner or reputed owner the order should not be obtained *ex parte*. Further, it is contended that the condition precedent to the making of the order have not been complied with. The publication of the notice in the *Government Gazette* cannot be taken as being an intimation that an application was to be made to the Court. The Council could get in the outstanding rates by suing, if they had chosen to adopt that course. The note at the foot of the petition that it was not intended to serve it upon any person is clear as to the application having been regarded as an *ex parte* one. On the question of non-compliance with the conditions precedent, it is submitted that the provisions of clause 186 of the Act of 1858 have not been properly carried out. In the first place the petition does not set out that the property to be sold was rateable, nor that the assessment had been made by the Council applying for the order. It is well known that as population increases the boundaries of District Councils are often altered by a division of the old district. The arrears of rates for payment of which the order had been obtained extend as far back as 1864, and therefore it is quite within the bounds of probability that some of the assessments in question have not been made by the Glanville Council. Then, also, the notice in the *Gazette* did not comply with the form prescribed in the Act. It should have been addressed to the owner, or reputed owner, where known, and in any other case "To all whom it may concern." The Council, however, have adopted the latter form for all cases. Again, it manifestly was not the intention of the Legislature that a whole batch of notices should be included in one. There should have been a separate notice given to each owner or reputed owner. It has been admitted that the Council considered Mr. E. Coles as the reputed owner of Allotment 6. The Act also provided that the notice should set out the amount of rates due. The object was evidently that specific information should be given as to how the various amounts were arrived at,

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE EX PARTE JOHN HINDMARSH. }	EQUITY.
----------------	---	---------

so that an owner might be able to check the charges. The notice in the case before the Court, however, lumped all the particulars together under the heading "Amount of rates due." In the next place it is to be observed that the Act gave power to the Court or Judge to order a sale of the property or so much thereof as may be necessary to satisfy the claim for rates and interest. The Council, therefore, should adduce to the Court evidence as to the value of the land they proposed to sell, so that there might be an opportunity given of seeing whether it would be advisable to order a sale of the whole or only a part. The justice of such a provision is apparent, as otherwise a property worth £3,000 might be sold to meet £3 arrears of rates; moreover, it is a necessary protection against fraud. As to the equity of the case, the Council certainly have no claim to the consideration of the Court, inasmuch as the applicant offered to pay all just claims upon his property, and in the face of that the order was proceeded with.

J. W. Downer, on the same side.—It will hardly be contended that the order for sale has not been made by the Supreme Court in its equitable jurisdiction. An order can only be made by the tribunal to which the petition has been addressed, and the Council have entitled all their proceedings "In Equity" and addressed the three Judges. It cannot be said that any of heading was surplusage, as to admit that would be to prevent perjury being charged on the affidavits. With regard to the question of jurisdiction, the Equity Act positively defines what the equitable jurisdiction of the Supreme Court is. The Primary Judge is to possess all the ordinary powers of the Lord Chancellor, and to exercise all the Chancellor's Common Law and Statutory Jurisdiction. Then, can it be said that the order in question has been made under a power "similar or analogous to any jurisdiction of the Courts of Equity in England?" Certainly the Lord Chancellor has no analogous Common Law powers, and the only similar statutory jurisdiction is that which has been referred to under 6 & 7 William IV., cap. 71, and which was exercised by the Courts at Westminster. The second question is, admitting there is jurisdiction in Equity under the Statute,

SUPREME COURT. }	DISTRICT COUNCIL OF GLANVILLE EXPARTE JOHN HINDMASH. }	EQUITY.
------------------	---	---------

can it be exercised *ex parte*? With regard to the notice in the *Gazette*—— (GWYNNE, J.—I don't think that can be held to take it out of the category of applications *ex parte*, which are generally understood to be those where the petition or other process is not served on any person who might be likely to oppose it.) Yes. If the *Gazette* notice was operative as suggested, a Council might give notice when no rates were really due, obtain an order, and so wrongfully deprive a man of his property, and there would be no remedy. In the Hammersmith case the distinction drawn was that the Court had power to give subsequent summary relief, but there is no such proviso in the Act of 1858. Then as to the notice in the *Gazette* not complying with the Act, it is clear that clause 186 provides for something which the form of notice did not contain—namely, that the notice should be addressed. The petition also in the case before the Court neither alleged nor proved that it was the same Council which made the rates and applied for the order for sale. The Council might only be the assignees of the rates. The objection as to all the notices being lumped together is one of substance—not a mere technical point. It is important that the particulars of the amount of rates claimed should be set out, as there could be no application in respect of rates which were not two years overdue; but in the *Gazette* notice which appeared in March, 1870, the Council charge for rates for the year which ended in the June following. It is important to consider the effect of the word “respective” as regarded the form of notice. The intention undoubtedly was that the word should relate to the several rates levied and the times when they fell due; but the Council has treated the word as referring to the “respective” owners of land and the different allotments. I would observe, also, that when the matter was being brought formally forward the legal advisers of the Council took care to file separate petitions and obtain separate orders for sale in respect of each allotment.

Stow, Q.C., on behalf of the purchaser of the allotment.—Except as to the question of the order having been obtained on an *ex parte* application, all the points which have been referred to have been already decided by the Court. Exclusive of that, however, it is

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

contended that the order should stand. The first point is as to jurisdiction. Irrespective of the Equity Act, the Court has power to make the order. It seems to be a common error to suppose that originally the jurisdiction of the Supreme Court of the province was only a Common Law one, but the Acts establishing the Court all declare that the jurisdiction to be exercised is a co ordinate one of Equity and Common Law. Then, where the jurisdiction is in the Supreme Court, and the Court at Common Law is unable to carry out the matter effectually, it follows as a necessary consequence that jurisdiction is taken to be an equitable one. But the powers under the Act of 1858 are clearly equitable. At Common Law proceedings are never initiated by petition. The sale of land also at Common Law is by writ of execution, but the Act in question provides for a conveyance by the Master of the Court. This is peculiarly an equitable procedure. The money, too, is to be paid into Court, which is never done at Common Law. And, further, provision has been made for making enquiries ; no machinery exists at Common Law for doing that. With regard to the manner in which the proceedings have been entitled, there is no Statute or rule directing that there should be any special method of intituling causes ; but as a matter of convenience it has become usual to distinguish between the Equity and Common Law proceedings. In England matters are entitled "In Chancery" to distinguish the Court from the Common Law tribunals. But then the effect of the Equity Act has to be considered in the question of jurisdiction. The Primary Judge has power to act in cases where the jurisdiction is "similar or analogous" to that exercised by the Lord Chancellor in England. The observations which I have made as to the procedure provided by the Act of 1858 will show that the jurisdiction is clearly one "similar or analogous" to the equitable powers of the Lord Chancellor. Then as to whether the jurisdiction can be exercised *ex parte*. In the first place, it certainly can be so exercised where the owner or reputed owner of the land is unknown, and the Statute has applied the one rule to all cases. If in the cases were there are owners or reputed owners they were to be joined as parties in the application to the Court for the order for sale, what necessity would

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

there be for the Master of the Court in all cases to execute the conveyances of the land so sold? As to the authorities which have been cited, *Capel v. Child* was evidently demurred to in the Hammersmith case, and the Judges only agreed to administer the dictum laid down in the case referred to if a matter exactly on all fours were brought before them; but in *Capel v. Child*, also, the party who should have been joined was well known and easily accessible. But supposing the reputed owner were summoned, the real owner would be placed in no better position, as the Court would as a matter of course proceed to make the order when the reputed owner made known that he had no title to the land. (GWYNNE, P.J.—If I have not jurisdiction, it appears to me the whole proceedings will be null and void. If I have, the applicant should have appealed against the order in the proper time. That seems to me the true position of the case.) Yes; and if the applicant could not have appealed by reason of not having notice of the proceeding, he could have got the time extended. The best case, however, Mr. Hindmarsh can make is one of negligence on his part in not seeing he was rated for his proper allotment; and the Council cannot be damnified by that, especially as Mr. Hindmarsh had the power of correcting the assessment. With regard to the notice not being good in form, it has been expressly held to be so in the preceding cases in reference to the same Council. It is sufficient to have put the applicant on enquiry, and the non-performance of minor conditions will not be held to invalidate the proceedings where the basis of the matter is properly laid. It would be manifestly unjust to the purchaser of the allotment in question to compel him to prove that all the preliminaries to the making of the order had been strictly performed. As to the petition not stating that the land was rateable, there was an allegation that rates had been levied and were overdue; and, moreover, all the land within a District Council boundaries excepting Crown lands and churches is necessarily rateable. With regard to the rates not having been made by the Council which presented the petition, the Act of 1858 contains a provision by which, when a new district is formed out of an old one, power is given to collect rates previously made; and, further, it was sworn that the rates

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

were due to the Glanville Council. But it is said that the notice in the *Gazette* was improperly addressed ; but no particular form of address is provided by the Act, and Mr. Cole's name appeared in the notice as the reputed owner of the allotment in question. It is not specified that the name should be either at the top, bottom, or in the middle ; but the fact of there being a schedule to the form of notice prescribed by the Act points to the intention to bring the notices together. If a separate notice is to be given to each, the schedule would be useless. With reference to the words "respective sums," the expression refers evidently to several accessories and several principals, and the proper application of each accessory to its proper principal. If there were two sums due to A, it would not be necessary to use the word "respective," but if A and B were concerned it would be different. But the notice is not intended to be technically dealt with as long as it is substantially correct. To give such notices as has been suggested would have been to depart from the directions of the Act, and that is always a dangerous course to pursue. A great deal has been said as to Mr. Hindmarsh having offered to pay his arrears ; but the simple answer to that is that he did not make the offer until the order for sale of his land had been made by the Court, and even then was referred to the solicitor for the Council, whom, however, he did not take the trouble to see.

Way, Q.C., for the District Council.—Both the Council and the purchaser had a right to rely upon the order of the Court and the decision which has already been arrived at after argument on the question of jurisdiction. It is quite clear, too, that Mr. Hindmarsh is not entitled to any consideration at the hands of the Court, as he has kept quiet for years while his property was being improved by the money of other ratepayers. On the question of jurisdiction it is obviously more convenient that the proceedings should be in Equity. As to their being *exparte*, the Hammer-smith case is against the applicant. There the case was of a writ, which requires much greater caution than an order. And, again, what would Mr. Bucknall's position be if the order were set aside? He could not get his money back again, because there would not

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

be an entire failure of consideration. He had got his conveyance, and whether it were under a void order or not, still he had it; but, further, the order could only be set aside upon appeal. There might be a rehearing ordered in an ordinary cause; yet a jurisdiction like the one under consideration is to be exercised once for all, and can only be set aside on appeal. It cannot be set aside on the ground of irregularity when it has been acted upon. If the jurisdiction were in the Primary Judge, the applicant is too late to interfere with what has been done.

J. W. Downer, in reply.—It has been submitted on the question of jurisdiction that the Common Law Courts are never invoked by petition; but the Act of 1858 is a Statute which mentions the forum which should deal with cases under the Act, and also provides the means by which its aid is to be secured. It has also been said that the fact of the Master of the Court executing the conveyances of the land sold points to an Equity jurisdiction, but the Master is as well known on the Common Law as on the Equity side of the Court. The whole argument on the other side as to the jurisdiction has failed. It has not been shown that the powers given by the Statute are “similar or analogous” to any jurisdiction of the Lord Chancellor. With reference to the machinery for carrying out the Act, and the inconvenience which would arise from its being confined to the Common Law side, the simple answer is that the Statute itself provides all the machinery and the manner in which it is to be carried into operation. As to the matter being *res judicata*, it is evident that the question of jurisdiction has only been incidentally raised in the previous cases. The *Hammersmith* case has been referred to on the question of the inconvenience and expense of directing a separate notice to be given to each owner of land, but in that case the only point was as to the granting of a tenancy from year to year. The Judges would never have regarded the question of inconvenience if it had been a matter as in the case before the Court of depriving a man of his freehold; also, as to the only remedy being by appeal, Lord *LYNDHURST* said in *Capel v. Child* that the fact of there being a right of appeal is not sufficient to justify a man's being deprived

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE } { EXPARTE JOHN HINDMARSH. }	EQUITY.
----------------	--	---------

of a hearing on the original judgment. But, further, there can be no appeal from an *ex parte* order, which it is contended on the other side the one in question was. That point is so settled under the Insolvent Act. If there be no jurisdiction, also, in the Court below, the appellant has no *locus standi* before the higher Court; and if it be an *ex parte* jurisdiction, the applicant can have no right to ask the intervention of the appellate tribunal. As to the *Gazette* notice, it is clear from the language of Section 186 of the Act that there should be a distinct notice to each owner or reputed owner, because the singular number is used throughout. With regard to the schedule to the form of notice in the Act, the schedule is merely a list, and might refer only to the several allotments to be sold. (GWYNNE, P.J.—I am inclined to agree with you as to the notice, if by deciding the matter so I shall not be upsetting the established practice of the Court.) Even supposing the practice sanctioned the notice as given, the Council have shown by their own affidavits that they have not complied with the Act, because there is an admitted knowledge of the existence of a reputed owner of Lot 6, and yet they head their notice "To all whom it may concern." But if they could use that heading they have been guilty of a grave error, inasmuch as they set out that Eusebius Coles was the reputed owner, and yet they inserted the name as "A. Coles" in the notice. On all the grounds the order should be set aside.

Cur. ad. vult.

17 November—

GWYNNE, P.J., now delivered judgment as follows:—This is an application to set aside an order made by me on the 17th day of October, 1873, for the sale of an allotment of land situated on the west side of Port Adelaide, containing about an acre, being No. 6 in the Government plan of three Port sections. The order sought to set aside was made by me by virtue and in pursuance of Section 186 of Act No. 10 of 1858. The order was made on the petition of the District Council, supported by an affidavit of Mr. William Russell, Clerk of the District Council, of Glanville. The petition and affidavit are in the usual form hitherto required by the Court,

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

and they show that the rates in respect of which the order for sale was made commenced to fall in arrear in the year 1865, and the arrears have gone on accumulating ever since—that, in fact, Harbour Allotment No. 6 has never from the constitution of the Council contributed one penny to the burdens of the district. Although the order was made on October, 17, 1873, no sale took place till March 24 last, when the Harbour Allotment No. 6 was sold by public auction, and was bought by Mr. Bucknall for £80. He has paid the purchase-money, and the property has been conveyed to him by the means and in the manner prescribed by the Act. Although to comply with the application and to set aside the order for the sale would at the present stage of the proceedings cause great uncertainty as to the validity of sales generally under the Act, and render almost valueless property sold, and also cause great complication and litigation, still, if I thought the applicant, Mr. Hindmarsh, was entitled on the merits of the case or by strict law to have it set aside, I would not, so far as in me lies, for a minute hesitate to give him what he asks. It is important in order to the proper decision of this case to refer to the provisions of the District Councils Act, 1858. By the 67th Section it is provided that whenever it is considered necessary for any of the purposes of that Act a District Council may make an assessment of all rateable property within the district according to the full estimated annual value thereof, with the names of the several occupiers and owners thereof, so far as known, and the nature of the property assessed, and the same shall be entered in a book, and whereof three copies at least shall be made, which shall be deposited at different convenient places within the district. The 68th Section requires public notice of the making of the assessment to be given, and of the places where the copies thereof may be seen, and enacts that the copies shall be open to inspection. The 69th Section provides that any person may within ten days after the publication of the notice appeal against the assessment for any of the grounds set out in that section. Amongst them is this ground—that he is not owner or occupier of the whole or any particular part for which his name appears as owner. Then comes the 73rd Section—that the District Council may levy a rate or rates on the

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE } { EXPARTE JOHN HINDMARSH. }	EQUITY.
----------------	--	---------

property included in such assessment. Now it is to be observed that it is the property, and not the owner, which is the object of taxation. The assessment is to be "of the property." The names of the occupier and owner seem of secondary importance; they are only to be introduced into the assessment so far as known. And by the 73rd Section the Council are to levy rates on the property. The 84th Section enacts that the person primarily liable to the payment of rates shall be the person appearing in the assessment-book as occupier of any rateable property or the owner of any unoccupied rateable property, or it may be recovered at any time after a demand from any person in possession of the property at the time the rate is demanded; or if the property is vacant, or there be no sufficient distress, the owner shall be liable. The 184th Section provides that the rates may be recovered by proceedings at law; and the 185th Section gives authority to distrain on the land, or, if the person liable to pay resides in the district, on goods in his private residence. Then comes the 186th Section, on which the proceedings now before me are grounded. That section has been so repeatedly referred to and commented on during the argument that I do not think it necessary to set it out here in full; I shall therefore merely refer to such parts of the section as I think necessary. I will here observe that the remedies to recover the rates range themselves in four classes—first, against the person by action; secondly, against the goods by distress; thirdly, against the property rated by leasing it from year to year; and fourthly, by selling the fee-simple of the land in respect of which the rates are in arrear. This authority, however, to sell requires the sanction and order of the Supreme Court, and the reason of that requirement is obvious. It is an unusual and very powerful remedy, and only justified by the minute subdivision of property and the migratory habits of the inhabitants of these colonies; and purchasers would not be easily found if they had not some such solid ground as an order of the Supreme Court for the sale to assure them of the validity of the proceeding. I will now first dispose of Mr. Hindmarsh's case upon the merits, and then proceed to deal with the arguments of his learned counsel on the law

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE }
EXPARTE JOHN HINDMARSH. } EQUITY.

of the case. Mr. Hindmarsh, in his affidavit filed on the 17th September, 1874, says "no demand was ever made upon me for the said rates alleged to be due in respect of the said land." The answer is, No. 6 was never known by the Council as the property of Mr. Hindmarsh, for in the assessment Mr. A. Coles appears as owner. That this error was continued from 1865 up to this day is not a matter of which Mr. Hindmarsh can complain, for he must be taken to know his own property; and it may be fairly asked why did he not, by appeal against the assessment, by application to the District Council, or by other means set this matter right. The law seems to me to have imposed that duty upon him, subject to the risk of the reputed owner being dealt with as the real owner, and to all the consequences of that substitution; but beyond the effect of this particular Act it is a principle of law that the debtor must seek out and pay the creditor. Mr. Hindmarsh further says that on the 27th of November, 1873, he saw Mr. Rix, the then Clerk and Collector of the said District Council, at Port Adelaide, and offered to pay him all rates and arrears due in respect of his said land (that is, I suppose, Allotment No. 6), without any deduction whatever, but that Mr. Rix informed him he could not receive the rates from him, as the matter was in the hands of the solicitor of the Council. Mr. Hindmarsh is a practitioner of this Court, and what different conduct could he expect at the hands of Mr. Rix? for at this time (whether the fact was known or not to Mr. Hindmarsh he does not inform us) the order for sale had been obtained, and Mr. Hindmarsh must have known it would be the height of folly on the part of Mr. Rix to interfere in the matter. But had Mr. Hindmarsh called upon the solicitor of the Council he would have known, if he did not already know, that an order for sale had been made. But no doubt the solicitor, upon a proper explanation, would have stayed his hand. Why did not Mr. Hindmarsh call and explain the matter? Why did he not point out the mistake in which the Council had fallen respecting the ownership of Allotment 6? I cannot imagine. However, on the 23rd December, 1873, Mr. Hargrave, on the behalf of Mr. Hindmarsh, again had an interview with Mr. Rix, and had a similar reception to that accorded to Mr. Hindmarsh. Mr. Har-

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE } { EX PARTE JOHN HINDMARSH. }	EQUITY.
----------------	---	---------

grave, was, however, more communicative, for he informed Mr. Rix that Mr. Hindmarsh was not the owner of the Allotment No. 6. All that Mr. Rix would say was, "The affair is in the hands of the solicitor, and I cannot interfere." Presumably the result of Mr. Hargrave's interview with Mr. Rix was communicated by Mr. Hargrave to Mr. Hindmarsh; and it was reasonable to expect that Mr. Hindmarsh, seeing that it was hopeless to expect Mr. Rix to stultify himself by interfering, would have at once sought an interview with their solicitor, but he does nothing of the sort. He remains inactive till the 29th of December in this colony, when he embarks for New Zealand, and remains absent until the 24th day of April. 1874, appointing no agent to attend to this matter on his behalf, and on the 24th of March last (five months after the order for sale was obtained) the allotment was sold. Mr. Hindmarsh, in his affidavit of the 17th September, says that it was not until after the making of the order for sale of the Harbour Section No. 6 that he had any knowledge that the notice referred to the petition had been published in the *South Australian Government Gazette*; but the *Gazette* is the only organ in which the notices are required by law to be given, and if he did not look at the *Gazettes* it was his own folly or misfortune. But Mr. Hindmarsh does not state whether he ever knew, or if so when he first became aware of the fact, that his Allotment No. 6 stood in the assessment as the property of Mr. Coles, or that it was not in Mr. Hindmarsh's own name. Mr. Hargrave, who says he acted on behalf of Mr. Hindmarsh, knew that Mr. Hindmarsh was the owner of No. 6 on the 23rd of December, 1873, at all events, because he tells us that he informed Rix of the fact on that day; and presumably Mr. Hargrave got his information from his principal, Mr. Hindmarsh, who therefore knew the fact previously to Mr. Hargrave becoming acquainted with it. But I think the knowledge of his position on the assessment must be attributed to Mr. Hindmarsh from the time of its publication. I cannot understand how Mr. Hindmarsh, knowing that he had property in the District of Glanville, knowing that his allotment was No. 6, knowing that he had never paid any rates in respect of that section, and knowing that proceedings were being taken against

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMASH. }

him by the solicitor of the Council, should not have sought an interview with that gentleman. Had he done so all would have been right, for had he tendered that gentleman the amount of the rates and costs no sale would have been permitted or even desired by the Council or their solicitor. I cannot suppose that a gentleman of Mr. Hindmarsh's position acted upon the view that the District Council being in a muddle with regard to the ownership they were remediless for the recovery of the rates by sale of the land ; but I cannot understand how he could, with his knowledge that legal proceedings were going on against him, quietly leave the colony for some four months (leaving no agent behind him), leaving things to take their course. He offers me no explanation of this extraordinary conduct, and I think I am bound to say that so far as the merits of the case are concerned they are altogether against his application. I will now proceed to examine the objections in point of law urged by *Mr. Downer* against the validity of the order for sale. The first objection was that I, as Primary Judge, had no jurisdiction to make the order, because the peculiar jurisdiction given by the District Councils Act, 1868, Section 186, is not similar or analogous to any jurisdiction, power, authority, or duty now vested in the High Court of Chancery. But it appears to me the jurisdiction under the above Act is analogous to the jurisdiction conferred on the Court of Chancery by the Trustee Acts and the Lands Clauses Consolidation Acts—not, perhaps, closely analogous, but still not very remotely analogous. But, assuming there is a want of closeness to the required analogy, yet it cannot be denied that the 186th Section of the Act calls into play equity procedure. The application to the Court must be by petition ; there may be (for there has been on numerous occasions) references to the Master ; the Court is to order a sale, and that the Master shall execute a proper conveyance ; and, lastly, the fund is paid into Court and is administered by the Court. The machinery of a Common Law Court is inadequate to the carrying out the provisions of the Act ; and, in fact, the jurisdiction in question has always been exercised by this Court as part of its equitable jurisdiction. However, by the Equity Act of 1866 the equity jurisdiction of the Supreme Court in the first instance is

SUPREME COURT. { DISTRICT COUNCIL OF GLANVILLE } EQUITY.
 EXPARTE JOHN HINDMARSH. }

vested solely in the Primary Judge, and it therefore follows that if I could not exercise jurisdiction in the matter of this petition no Court in the colony can; and the Equity Act of 1866 was not intended to lessen but increase the powers of the Supreme Court. It appears therefore to me that I as Primary Judge have jurisdiction in the matter, and I shall continue to exercise it until better informed by the Court of Appeal. It was further contended by *Mr. Downer* with great force that the order for sale should not have been made *ex parte*, but only on summons—a notice first served on the ratepayer calling upon him to show cause against the making of it, and he cited the cases of *Capel v. Child*, 1 L.J., N.S., Ex., 205, and *in re Hammersmith Rent Charge*, 19 L.J., Ex., 66. Unquestionably the case of *Capel v. Child* was decided upon this principle of justice—

“*Quicumque aliquid statuerit parte inaudita altera.*

Æquum licet statuerit haud æquus fuerit,”

and that principle was fully recognised in *in re Hammersmith Rent Charge*; and I may be permitted to say that not Baron PARK or any other Judge that ever sat on the English Bench had greater reverence for that principle than I have. But still that principle is not binding upon the Legislature; and although one would rather strive to apply it where the construction of an Act would permit, yet it cannot be permitted to prevail against the express or implied intention of the Legislature to the contrary. I think in the present instance the very policy of the District Councils Act compelled the local Legislature to a technical though not substantial disregard of it. In making up the assessment some of the owners of rateable property of course would be absent from the colony, some altogether unknown, and some only known by repute. As respects the owners resident in the colony and known, there would be no difficulty in serving them with notice to show cause against the making the order for sale; but they are just the class with respect to whom a resort to a sale is least if at all necessary; they can be sued in the Local Courts. The 186th Section enacts that after rates are in arrear for four years, and after notice inserted three times in the *Government Gazette*, that the District Council intends applying to the

SUPREME COURT.	{ DISTRICT COUNCIL OF GLANVILLE EXPARTE JOHN HINDMARSH. }	EQUITY.
----------------	--	---------

Supreme Court or a Judge for an order to sell, that then the Court or Judge, on being satisfied by affidavit or otherwise that the arrears are lawfully due and were in arrear at the time of the first publication of such notice, and that all things required by that clause to be done have been done, shall order the sale of the rateable property, &c. The language is general ; it applies to all places equally, whether there is a known owner or not, a reputed owner, or no kind of owner, and it would be absurd so to construe the language of the Act as to make it necessary to a sale that the absent, the unknown, or reputed owner should be summoned to show cause against it. Such a construction, in my opinion, would entirely frustrate the object of the Act. In the present case, for instance, if any one were to be summoned it would be Mr. Coles (the reputed owner). What would come of that? But this question is really determined, for the universal practice of the Supreme Court has been to exercise this power *ex parte*. As respects the objections to the form of the notice inserted in the *Gazette*, I think it the form heretofore used, and that it substantially complies with the Act. This application is therefore dismissed, but I think it should be without costs.

Application dismissed without costs.

SUPREME COURT.

HODGSON v. ORR.

COMMON LAW.

HANSON, C.J., GWYNNE, J., WEARING, J.

[COMMON LAW.]

1 OCTOBER AND 3 DECEMBER, 1874.

HODGSON v. ORR.

POLICE ACT, 1869-70.—False Imprisonment—Notice of Action.

A South Australian constable arresting a prisoner out of the Province for an offence committed within the Province is in the same position as a private person, and is not entitled to notice of action under the Police Act, 1869-70.

RULE nisi, calling upon the defendant to show cause why the nonsuit should not be set aside, and a new trial granted on the grounds that the defendant was not entitled to notice, because the arrest was made in Victoria, where the Police Act 1869-70, did not apply; that there was no evidence that the defendant had reasonable grounds for believing that he was acting under the Police Act in making the arrest, and even if there had been such evidence it should have been put before the jury, which was not done; and that the defendant had waived any right to notice of action.

The action was tried in the Local Court of Penola.

The facts were as follow:—The plaintiff, Henry Hodgson, labourer, in the employ of Mr. Ralston, Penola, was arrested by the defendant, George Orr, police trooper, stationed at Penola, for stealing some cattle which had been seized under a writ of execution against the goods of a Mr. von Alwyn. The plaintiff, knowing the cattle belonged to his master, had, acting under instructions, taken possession of them. The arrest was made over the Border, within the Victorian boundary, while the plaintiff was driving the cattle in question to the Dorodong Station. In accordance with the provisions of the Police Act, 1869-70, the plaintiff had given the defendant notice of action, but the case had been brought on before the specified time because it was alleged the defendant on receiving the notice told the plaintiff he might proceed as soon as he pleased. Thereupon the plaintiff sued the defendant for £100 damages for malicious imprisonment.

SUPREME COURT.

HODGSON v. ORR.

COMMON LAW.

On the trial the Magistrate directed the jury to nonsuit the plaintiff, on the ground that the defendant had not had notice of action as prescribed by the Police Act.

On the motion for the rule the following cases were cited :—

Jones v. Williams, 3 B. & C., 762

Hughes v. Buckland, 15 M. & W., 346

Roberts v. Orchard, 33 L.J., Ex., 65

Lecte v. Hart, L.R., 3 C.P., 322

Way, Q C., now moved that the rule be made absolute.

Boucaut showed cause.—For the purposes of the argument the defendant admits the waiver so far as supported by the evidence relied on by the plaintiff. If, however, the defendant had a right to notice of action, merely telling the plaintiff that he might go on with his action as soon as he pleased would not bar the right. Nothing but an express written consent would support a plea of waiver—

Martin v. Upshot, 3 Q.B., 662.

The defendant might also admit for the purpose of the argument that the arrest complained of was illegal ; but if a constable had reasonable cause for believing that he was acting in the discharge of his duty, he would be entitled to notice before an action was brought against him. The very object of the clause in the Police Act, and all similar provisoes as to notice, was to protect officers who had committed some illegal act under the idea that they were doing what they were called upon to do—

Theobald v. Crichmore, 1 B. & Ald., 227.

All that is necessary is an honest belief in the *bona fides* of what is done—

Roberts v. Orchard, 9 L.T., N.S., 728, 33, L.J. Ex., 65.

In

Jones v. Williams, 3 B. & C., 762, 5 D. & R., 654,

an authority relied upon on behalf of the plaintiff, the action was against a person who had assumed powers which he never possessed, and which he never had any just grounds for believing that he possessed. There the defendant had not brought himself within the Statute as to notice. (GWYNNE, J.—I conceive that it would be a question for a jury whether the constable thought he could go over the Border to make an arrest.) That may be so, but the plaintiff did not ask that the point should be put to the jury, and therefore cannot take advantage of it on a motion for new trial. There is also a distinction between the actions of a private person and of a man acting in a public capacity. In the former case the *onus* lies upon the defendant to show that he actually had good reason for acting as he did; but, on the other hand, in the case of a public official, the *onus* is shifted, and it rests with the plaintiff to prove the existence of *mala fides*. No matter how absurd, too, the belief of a person may be in fact, if it is a *bona fide* belief he is entitled to shelter himself under it—

Chamberlain v. King, L.R., 6 C.P., 474

Selmes v. Judge, L.R., 6 Q.B., 724.

A public officer, also, will be presumed to be acting in the discharge of his public duty and *bona fide*—

Walker v. The Nottingham Board of Guardians, 28 L.T.,
N.S., 308,

and the *onus* of proof rests on the party challenging such *bona fides*—

Jolliffe v. The Wallasey Local Board, L.R., 9, C.P., 62
Green v. Hearne, 3 T.R., 301

In

Waterhouse v. Kean, 4 B. & C., 200,

a toll-keeper had, in the most flagrant way, charged double toll; but it was held that he could not be proceeded against until the expiry of a proper notice of action.

Way, Q.C., in support of the rule.—There is no case which establishes that where a constable is concerned it is necessary to show that he was acting maliciously. The case is clearly different from that of public bodies, and that there is a distinction where only a single individual is concerned is further evidenced by the fact that the Local legislature has thought it necessary to pass a special Act providing that no action can be maintained against a Magistrate, acting in his public capacity, unless malice be distinctly alleged.

HANSON, C.J.—The Court think it unnecessary to carry the case further. The Court are unanimously of opinion that where a person assumes to act as a constable, when in fact he is only in the same position as any private individual, he is bound to show something which would justify an arrest by a private individual. The defendant has not done so, and therefore the rule will be made absolute, and with costs.

GWYNNE, J.—I am of the same opinion. All the authorities appear to me to show that a person having authority and *bona fide* exercising it is protected by the law; but in the case before the Court the defendant assumed an authority which he did not possess.

WEARING, J., concurred.

Rule absolute.

HANSON, C. J., WEARING, J., GWYNNE, J.]

[COMMON LAW

17 DECEMBER, 1874.

BRIDGART v. GROOVES.

POWER OF ATTORNEY.—*Section of Land—Onus of proof—Certificate of Enrolment—Description of Attesting Witness.*

An attorney was duly authorized to execute all deeds necessary to complete a sale by his principal to A of a section of land, pursuant to an agreement, and also to complete any of his sales which he might be authorized in writing by his principal to effect.

The attorney subsequently executed a conveyance in the name of his principal to A of a section of land, but there was no written authority from his principal to the attorney to sell, nor any evidence that the section conveyed was that mentioned in the power.

Held—That the presumption was that the section so conveyed was the section referred to in the power of attorney, and the onus of proving to the contrary rested on the person impeaching such conveyance.

The certificate of enrolment described the attesting witness as "Clerk of the Supreme Court of South Australia," without otherwise defining his place of abode.

Held—That the description of a person in his official capacity was a sufficient compliance with Section 21 of the Registration Act of 1841.

SPECIAL case sent up from the Local Court of Adelaide.

The action was trespass for breaking into and entering upon allotments 669 and 700, in the village of Bowden. The defendant pleaded not guilty, and that the land was not the property of the plaintiff. The evidence at the trial was that the plaintiff was in possession of the allotments in question, and the defendant forcibly entered upon them, knocking down part of a wall. The defence was that the defendant had a title to the land. The Magistrates found for the defendant, reserving the point as to the validity of title for the opinion of the Supreme Court.

Way, Q.C., for the plaintiff.—The original land grant of the Section 354, which has been laid out as the village of Bowden, was to Mr. John Wright, resident in England, who gave a power of attorney to Mr. (now Sir) J. H. Fisher to act for him in this

SUPREME COURT.

BRIDGART V. GROOVES.

COMMON LAW.

Colony. Another power of attorney, however, was given to Mr. Henry Johnson, empowering him to execute all the necessary deeds to complete a sale by Mr. Wright to Mr. Fisher of a section of land in pursuant of an agreement. The latter power of attorney gave no power to Mr. Johnson to sell land except by the written authority of Mr. Wright. The first point, therefore, relied on by the plaintiff was that there was a fatal *hiatus* in the defendant's title, inasmuch as there was no identification of the section which Mr. Johnson was empowered to convey to Mr. Fisher, through whom the defendant claimed. (GWYNNE, J.—Is not there a presumption against you? Mr. Johnson was empowered to convey a section of land, and he did so; and it would be presumed that he acted rightly in pursuance of his powers.) It lies on the person claiming under the power of attorney to show that the power was properly exercised in respect of the property claimed. But, further, Mr. Johnson was only empowered to sell under a written authority from Mr. Wright. (HANSON, C.J.—That reservation only applies to land not comprised in the agreement with Mr. Fisher.) I think not, there being only one sale mentioned throughout the whole of the power of attorney. The next point is that the enrolment of one of the deeds of the defendant's title has not been properly proved. The conveyance from Mr. Wright to Mr. Fisher, also, has not been rightly received as evidence, only an office copy of the enrolment having been produced. The power to use such an office-copy is a statutory one, and, consequently, cannot be taken advantage of unless all the requirements of the statute have been complied with. Clause 21 of the Registration Act of 1841 distinctly provides that the place of abode of the attesting witness is to be given in the Registrar's certificate of enrolment, but that has not been done in the case before the Court. The words of the certificate are that the deed was proved by "Charles Algernon Wilson, Clerk of the Supreme Court of South Australia."

Ingleby, for the defendant.—The last point raised on behalf of the plaintiff is answered by Clause 23 of the Registration Act, making the Registrar's certificate of enrolment conclusive evidence. But, further, the words "Clerk of the Supreme Court of South

Australia" amply describe the attesting witness, and, therefore, the strict provisions of the Act have been complied with. As to the power of attorney, it will be seen that two allotments are concerned, namely, 699 and 700. With regard to the first of them, Mr. Fisher had in 1838 conveyed it away, so that the conveyance being over twenty years old would be conclusive against Mr. Wright so far as the statute was concerned. The defendant, then, having a title which would be good against Mr. Wright, was surely entitled to stand against the plaintiff, a mere trespasser. Mr. Fisher, then, must have had possession in order to convey lot 699 as he had done; and he being the person entitled to the whole section, it would be presumed that, having possession of a part, he had possession of the whole of it. (HANSON, C.J.—*Prima facie*, the plaintiff was the owner of the property, being in actual possession, and he could not, therefore, rightly be called a trespasser.) With regard to proving the identity of the section sold to Mr. Fisher, that was not necessary. The agreement between Messrs. Wright and Fisher dated back to 1836, and before the Colony was proclaimed. Consequently there had been no surveys, and identification of any particular section sold under the agreement was impossible. All that Mr. Wright sold was a portion of his right under the preliminary land order.

HANSON, C.J.—The Court are unanimously of opinion that the conveyance to Mr. Fisher by Mr. Johnson was the conveyance contemplated by the power of attorney from Mr. Wright to Mr. Johnson. As to the enrolment, the Court think that the description of a person in his official capacity is sufficient to meet the requirements of the Registration Act. The case, therefore, will be answered in favour of the defendant, and the judgment of the Court below will stand.

Judgment for defendant.

APPENDIX.

GWYNNE, J. (Acting Chief Justice), WEARING, J.]

COMMON LAW.

5 NOVEMBER, 1874.

PALMER v. ANDREWS (Nominal Defendant).

REAL PROPERTY ACT, 1861.—Transfer by Sheriff—Fi. fa.

The Sheriff has no power to convey or transfer to the purchasers land under the Real Property Act of 1861 sold by him by virtue of a writ of fi. fa.

And per WEARING, J., Quære—*Whether he has power to sell land under that Act?*

THIS case has already been reported (see 6 S.A.L.R., 19), but counsel for the plaintiff having intimated his intention to appeal to the Privy Council, had requested the Court to give written judgments setting out fully the grounds of their decision.

GWYNNE, J., now delivered judgment as follows:—This was a rule calling upon the plaintiff to show cause why the verdict herein should not be set aside, and a verdict entered for the defendant, or that the plaintiff be non-suited, pursuant to leave reserved, on the ground that the Registrar-General has not been guilty of any breach of duty. The rule was twice argued—once before the Full Court, and again before myself and my learned colleague, Mr. Justice WEARING, the Chief Justice having in the meantime been called away to administer the Government of the colony. On both arguments *Mr. Gawler*, the Solicitor to the Real Property Act Commissioners, appeared for the defendant, and *Mr. Palmer*, the defendant, appeared in person. I must confess, however, that personally I derived little or no assistance from the arguments of the learned counsel engaged. The question arises out of the new system of land transfer which Mr. Torrens (now Sir R. R. Torrens) inaugurated in this province, the legislation on which subject, however, is so vague, uncertain, and wanting in precision, that I feel incapable of interpreting many parts of it with any degree of satisfaction to myself. In the present case, however—looking at the declaration, and seeing how the plaintiff had shaped his case, and particularly at the averments of the wrongful acts complained of by the plaintiff in his declaration—I thought

SUPREME COURT. PALMER v. ANDREWS (NOMINAL DEFENDANT). COMMON LAW.

I saw sufficient to justify me in saying that the rule should be made absolute, in which opinion my learned colleague, Mr. Justice WEARING, concurring, it was made absolute accordingly by the Court ordering that the verdict be set aside, and a verdict entered for the defendant. From that decision the plaintiff has obtained leave to appeal to the Privy Council. The action is founded on the 128th section of the Real Property Act, 1861, which enacts that "any person sustaining loss or damage through any omission, mistake, or misfeasance of the Registrar-General, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act . . . may bring an action against the Registrar-General as nominal defendant for recovery of damages, and in case," &c., &c. Copy pleadings accompany the transcript. The only plea was not guilty. The trial was held before the Chief Justice. A copy of His Honor's notes accompany. *Mr. Gawler* appeared for the defendant. He made no technical objections, and, as I am informed by the Chief Justice, he was quite willing to leave the question pretty much at large in the hands of the Court. A verdict, it appears, was taken for the plaintiff by consent for £125, with liberty for defendant to move for a non-suit or to enter a verdict for him. The land the subject-matter of dispute is under the new system known in the colony as Torrens's real property law. Five Acts of the local Legislature have been passed with a view of establishing and perfecting this system, namely, the Act 21 Vict., No. 15; 22 Vict., No. 16; 23 and 24 Vict., No. 11; 22 of 1861; and No. 11 of 1869-70, and an amending Act is now before the local Legislature. The primary question which presents itself for consideration is—Can the Sheriff under a writ of *feri facias* sell land which has been brought under this new system? With regard to land under the ordinary law such a power has been conferred on the Sheriff by virtue of Act No. 5 of 1853, section 184. That Act, however, was assented to on 19th October, 1853, and therefore long before the new system was introduced. The first of the Real Property Acts (21 Vict., No. 15) was assented to on the 27th January, 1858; and the first section enacts that "All laws, statutes, acts, ordinances, rules, regulations, and practice whatsoever relating to

SUPREME COURT. PALMER v. ANDREWS (NOMINAL DEFENDANT). COMMON LAW.

freehold and other interests in land, so far as inconsistent with the provisions of this Act, are hereby repealed, so far as regards their application to land under the provisions of this Act or the bringing of land under the operation of this Act." Now there cannot be the slightest doubt but that section 184 of No. 5 of 1853 is altogether inconsistent with the provisions of the first Real Property Act, and therefore that section was repealed by it so far as regards the application of section 184 to land under the new system. The language of the first section of No. 15 of 21 Vict. in substance is repeated in each of the three succeeding Real Property Acts, and thus far, therefore, it would seem that land under the new system was not liable to be seized and sold by the Sheriff. But in the two last Acts is contained a provision (sec. 86 of 1860; and sec. 96 of 1861.) "When any estate or interest in land under the provisions of this Act shall be sold by the Sheriff under any writ, or shall be sold under any direction, decree, or order of the Supreme Court, or whenever any order of such Court shall be made authorizing the Curator of Intestate Estates to take charge of the real estate of a deceased proprietor, the Registrar-General, on being served with an office copy of the writ, direction, decree, or order, as the case may be, shall enter in the Register-book, and also upon the instrument evidencing title to the said estate or interest if produced for that purpose, the date of the said writ, direction, decree, or order, and the date and hour of the production thereof, and after such entry as aforesaid, the Sheriff, or person authorized by the Supreme Court, shall do such acts and execute such instruments as under the provisions of this Act may be necessary to transfer or otherwise to deal with the estate or interest: Provided always that unless and until such entry has been made as aforesaid no such writ shall bind or affect any land under the provisions of this Act, or any estate or interest therein; nor shall any sale or transfer by the Sheriff be valid as against a purchaser or mortgagee, notwithstanding such writ may have been actually in the hands of the Sheriff at the time of any purchase or mortgage, or notwithstanding such purchaser or mortgagee may have had actual or constructive notice of the issue of such writ." No one, I think, can read this section without seeing that it was

SUPREME COURT. PALMER V. ANDREWS (NOMINAL DEFENDANT). COMMON LAW.

the intention of the Legislature to bring about consistency between it and the new system ; in other words, that land, although under the new system, should thereafter be liable to be attached, sold, and conveyed by the Sheriff. But it appears to me that the Legislature have not used fit words to express their intention and object. The two things are in themselves essentially inconsistent, and no Legislature can by mere tacit assumption, or even by express declaration, so change the nature of things as to make what is inconsistent consistent. The new system is a formulary one, and like all other formulary systems its operation is necessarily confined within narrow and technical limits. That the new system is a formulary one sections Nos. 35, 41, 42, 47, 52, 63, and 91 of the Real Property Act, 1861, and the schedules of forms annexed to the Act manifest. The 35th section (at the end) has these words—“ Every instrument drawn in any of the several forms provided in the schedule hereto, or in any form which for the same purpose may be authorised in conformity with the provisions of this Act, shall,” &c. By the 41st section the Register-General is expressly forbidden to register any instrument purporting to transfer land, and except in the manner in the Act provided, nor unless such instrument be in accordance with the provisions hereof. That is, as I understand, unless the instrument be in the form prescribed by the Act. Presently, I will observe upon the particular instrument tendered by *Mr. Palmer* on the present occasion for registration, and which, I understand, from the argument of *Mr. Gawler*, the Registrar-General would upon the advice of *Mr. Gawler* have actually registered, but that *Mr. Palmer* was unable to procure the production of the outstanding certificate of title. Before doing so, however, I will notice the provisions of the Act as applicable to transfer. Referring to section 42 of the Real Property Act of 1861, and to form D of the schedule, and analyzing the transaction contemplated by the Act under the name of transfer, it will be seen that such a transaction consists of four parts—(1) that the transferor must be a registered proprietor ; (2) that he must use a form substantially similar to form D ; (3) that the form used “ shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created ;

SUPREME COURT. PALMER V. ANDREWS (NOMINAL DEFENDANT). COMMON LAW.

and, lastly, the transaction must have the element of registration. Again, as the sale to Mr. Palmer of land was subject to a mortgage, the operation of section 46 would come into play. This section provides that in every instrument transferring an estate or interest in land under the provisions of this Act subject to a mortgage or encumbrance there shall be implied the following covenants by the transferee:—"That such transferee will pay the interest or annuity secured by such mortgage after the rate and at the times specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum secured by such instrument, and from and against all liability in respect of any of the covenants therein contained or in this Act implied on the part of the transferor." Now it appears to me impossible to say the Real Property Act authorizes a transfer or conveyance by the Sheriff. He in no sense is a registered proprietor, nor has he any estate or interest in the land; if the property could be conceived as passing by the instrument when registered presented by *Mr. Palmer* for registration, it must be as passing from the judgment debtor to *Mr. Palmer*; the Sheriff was a mere conduit-pipe. As respects the form of the instrument tendered, it in no respect conforms to the requirements of the Act. It has no recital that the Sheriff, or William Thomas, or any one else is seised or possessed of the land, neither does it declare that the transfer is subject to the registered mortgage of the trustees of the Sir John Franklin Lodge of Oddfellows. Nor does it contain an accurate statement of the estate (that is, the quantity of interest) intended to be sold. On the contrary, it purports to convey an unknown and indeterminate estate—as the saying goes, "a pig in a poke." And lastly, William Thomas would lose the indemnity given by the forty-sixth section, and would still remain liable to the mortgagees for the principal-money and interest. I am therefore, I regret to say, forced to the conclusion that the Registrar-General was right in refusing to register the instrument which *Mr. Palmer* presented to him for that purpose. I will only add on this part of the case that I do not overlook the words contained in the ninety-third section—"The Sheriff shall do such acts and execute such instruments as under the provisions of this Act

may be necessary to transfer with the said estate or interest." But that in my view of the matter, although these words prevent the Sheriff from dealing with the land as though it were outside of the Act, yet the Act itself prescribes no specific acts to be done or instruments to be executed under it which would effectuate a transfer. It is a *casus omissus*. But then it might be said that admitting the Sheriff cannot for want of an appropriate form convey the legal estate, still that part of the ninety-third section of the Act relating to the service of a copy of the writ upon the Registrar-General and of his entry thereof in the register-book is sufficiently clear and so far workable, and that therefore the Court is bound to give effect to that part of the Act. Now as a matter of fact it was never disputed in the present case that the Registrar-General was served with an office copy of the writ, or that he made the proper entry of it in the register-book, or that the Sheriff had sold the land to the plaintiff. These facts must be taken as true; in fact, they are admitted on the face of the record. Now, as respects, the sale itself, it must be borne in mind that the Sheriff is only a conduit-pipe—he merely executes a statutory power, and till he signs and seals the instrument of transfer prescribed by law his power is not executed, and in the meantime, whatever remedies the purchaser may have against him at law for breach of duty, he has no estate or interest in the land at law or in equity. But with respect to the service of the copy of the writ on the Registrar-General and the entry of it in his book, it would appear by the ninety-third section of the Act that such acts had the effect of binding the land; that they had an analogous effect upon the land that the delivery of a *fi. fa.* to the Sheriff would have upon the personal estate of the judgment debtor. Therefore, although on the service of the office copy of the writ and entry of it in the register-book the property of the land was not thereby divested out of William Thomas, and although he was quite at liberty to sell and transfer it to his brother Lewis Thomas, yet he could only so sell and convey subject to the claim of the plaintiff. But what could the Registrar-General do in the case before me? Before answering this question I think it right to observe that I am compelled to attribute conduct to the Registrar-General which

SUPREME COURT. PALMER V. ANDREWS (NOMINAL DEFENDANT). COMMON LAW.

is really conduct for which the Solicitors to the Commissioners are really amenable to the public. The new system is very peculiar in this respect. Although the Commissioners are laymen—that is, not bred to the law—they exercise very high judicial powers and the Registrar may *quasi* judicial powers. But their knowledge of the law is supplied to them from time to time by the solicitors. In short, the solicitors occupy an analogous position to the Commissioners as the *Juris Consulti* did to the Magistrates or Judges in ancient Rome. There is, however, this great difference, that the *responsa* at Rome were made publicly; but those of the Real Property Solicitors are only given in private. Returning to the question, What did the Registrar-General do? Why, instead of giving effect to the sale of the land by William Thomas to Lewis Thomas as subject to the plaintiff's writ, he registers Lewis Thomas as a proprietor of the land subject, indeed, to the mortgage of the Oddfellows, but absolutely discharged from the charge or lien created by the plaintiff's writ, and delivers to Lewis Thomas a certificate of title accordingly. This, in my opinion, was a wrongful act on the part of the Registrar-General, and for which he is amenable to the plaintiff for damages. The agreed damages on the trial were £125. Notwithstanding, however, what I have said, I feel compelled to make the rule absolute, because the plaintiff seems to me not so to have shaped his case as to enable the Court to give effect to the view I have lastly taken of it. However, perhaps if a proper representation of the facts be made to the right quarter, the colony of South Australia will not be permitted to occupy the position of respondents before the Privy Council in such a case as the present.

WEARING, J., gave judgment as follows—The plaintiff in this action seeks to recover damages from the defendant as Registrar-General for having, as the plaintiff alleges, deprived him of an estate or interest in certain land by registering wrongfully another person as proprietor thereof. The action professes to be brought by virtue of the provisions of the 128th section of the Real Property Act, 1860. The land in question was, previous to the transactions to which I shall presently refer, registered in the Real

SUPREME COURT. PALMER V. ANDREWS (NOMINAL DEFENDANT) COMMON LAW.

Property Office as belonging to Mr. Wm. Thomas, for an estate of fee-simple of inheritance, subject to a mortgage to the Sir John Franklin Benefit Society. The plaintiff having recovered judgment against Mr. William Thomas for the sum of £125, caused a writ of *fi. fa.* to be issued, which he lodged with the Sheriff. That writ was registered in the Real Property Office. The Sheriff having sold the land under the execution to the plaintiff, made to him a transfer in the form used when land not under the Real Property Act is conveyed by the Sheriff to a purchaser. Armed with that document, the plaintiff presented himself at the Real Property Office, and required that he should be registered as transferee, and that a certificate of ownership should be delivered to him. The defendant declined to comply with that request, alleging as a reason for his refusal that the plaintiff did not produce the outstanding certificate of title. This the plaintiff was unable to do, as the certificate was then with the trustees of the Sir John Franklin Lodge as unpaid mortgagees. About that time Mr. Lewis Thomas, Mr. Wm. Thomas's brother, paid off the mortgage, and having obtained the certificate to Mr. Wm. Thomas, attended at the Real Property Office subsequent to the plaintiff's abortive visit there and got himself registered as proprietor of the land. The plaintiff claims as purchaser from the Sheriff under the ordinary process of a writ of *fi. fa.*, and the breach of duty on the defendant's part of which he complains is the registration of Mr. Lewis Thomas. To maintain his suit the plaintiff must prove—First, that he had an estate or interest in the land; and secondly, that he has been deprived of it by the illegal act of the defendant. Upon the first question the whole matter hinges. Now, it appears to me exceedingly doubtful whether under the provisions of the Real Property Act the Sheriff has power to sell under a writ of *fi. fa.* lands under the provisions of the Statute. But even if the Sheriff had such power, I am of opinion that the Legislature has provided no machinery by which he can transfer any estate therein to a purchaser. The 93rd section of the Real Property Act, 1861, undoubtedly suggests an inference that it was intended that the Sheriff should possess some such powers as those claimed for him

SUPREME COURT. PALMER V. ANDREWS (NOMINAL DEFENDANT). COMMON LAW.

by the plaintiff. But when on looking to the schedules annexed to the Act I find no form of instrument there given by which those functions can be exercised, I can only regard the present as a *casus omissus*, which requires either further legislative enactment or the exercise of those powers which by the 91st section of the Act are conferred upon the Registrar-General to be exercised with the consent of the Governor in Executive Council. I may also state that I consider the writ referred to in the 93rd section is that of *venditioni exponas*, and not a writ of *fi. fa.* The plaintiff by neglecting to register the former writ, in my opinion, took a wrong step. Upon the whole, I am compelled to come to the conclusion that the plaintiff in this record has no right of action, and that, therefore, the rule for a nonsuit must be made absolute. I very much regret having to express this opinion, because I think that the fair claims of the plaintiff have been prejudiced by defects in an Act of Parliament.

Rule absolute.

IN RE TALISKER MINING COMPANY.

THIS case is reported in 6 S. A. Law Reports, 98, and 7 S. A. Law Reports, 167.

On appeal to the Privy Council the judgment of the Full Court was reversed, and the decision of the Primary Judge upheld.

A report of the judgment of the Privy Council, which was not delivered until the present year, 1875, will appear in the next volume of the South Australian Law Reports.

INDEX

TO THE PRINCIPAL MATTERS.

ACQUIESCENCE.—See POLLUTION.

Page.

ACT No. 9 of 1859.—*Murder—Concealment of Birth.* On an indictment for murder of an infant the fact that the child was born alive must be strictly proved, and it is not sufficient to adduce circumstances which raise a presumption of violence.

An infant was found in a privy dead, with a piece of wood wedged in its mouth, but no evidence was adduced to show the child had been born alive.

Held—That there was no evidence to go to the jury to support the charge of murder.

Under Act No. 9 of 1859 the mother alone is liable on an indictment for concealing the birth of a child.

REGINA V. TOWNSEND. 72

ACT OF INSOLVENCY.—See BILL OF SALE.

ACTION, NOTICE OF.—See POLICE ACT, 1869-70.

AGREEMENT FOR LEASE.—See REAL PROPERTY ACT OF 1861 (2).

ALLOTMENT CALL.—See COMPANIES ACT OF 1864 (2).

APPLICATION *Ex parte*.—See DISTRICT COUNCILS ACT, 1858 (1)

—————See COMPANIES ACT OF 1864 (2).

ARTICLES OF ASSOCIATION.—See COMPANIES ACT OF 1864 (3)

—————COMPANY.

ATTESTING WITNESS, DESCRIPTION OF.—See POWER OF ATTORNEY.

ATTORNEY, EXECUTION BY.—See DIVISION VI. OF INSOLVENT ACT, 1860.

BILL OF SALE.—*Act of Insolvency*—A Bill of Sale of all the property of a debtor is not fraudulent so as to constitute an act of insolvency, if *bona fide* made in pursuance of an agreement entered into at the time of receiving the consideration; but delay in executing the bill of sale, and the circumstances under which it is executed, may be evidence of fraud, and should be left to the jury.

CHERRY V. FULLER. 113

BURRA RAILWAY ACT, 1869.—See LANDS CLAUSES CONSOLIDATION.

CAPITAL, INCREASE OF.—See COMPANIES ACT, 1864 (2).

—See COMPANY (1).

CAVEATING CAPACITY.—See REGISTRATION ACT OF 1841.

CERTIFICATE ISSUED PURSUANT TO FRAUDULENT APPLICATION.—See REAL PROPERTY ACT OF 1861 (1).

—OF ENROLMENT.—See POWER OF ATTORNEY.

CLAIM OF THIRD PARTY.—See LOCAL COURTS ACT, 1860.

COMPANIES ACTS.—*Dissolution*.—Where from any cause, whether from a defect in its Articles of Association or otherwise, a Company is unable to pursue the objects for which it is formed, the Court has power on petition of parties interested to order its dissolution.

A provision in Articles of Association of a Company requiring persons representing the whole of its shares to be present at all of its General Meetings is in itself a ground for ordering the winding up of the Company where some of the shareholders reside at the place where the operations of the Company are to be carried on, but at so great distance from the office of the Company as to render it difficult, if not practically impossible, to secure their attendance at such General Meetings.

IN THE MATTER OF THE COMPANIES ACTS, AND IN THE MATTER OF THE KAPUNDA UNITED TRADSMEN'S PROSPECTING COMPANY, LIMITED. . . 55

COMPANIES ACTS, 1864.—1.—*Compulsory Winding-up—Failure to prosecute objects for which formed—Qualification of Directors—Bona fide subscription for shares*. The Memorandum of Association of a Company purporting to be started for the purpose of purchasing and working certain claims specified in the prospectus provided, amongst other things, that the Company was to be considered formed as soon as 15,000 shares should have been applied for, and that applicants for shares should pay 2s. 6d. per share on application, and 5s. on allotment. Fourteen thousand shares only having been applied for, one of the Promoters sent in applications on behalf of persons in the Northern Territory for (in all) 1,000 shares, but on these shares no money whatever had been paid, and thereupon the Company was treated as formed, nor was there any evidence that such Promoter was authorised so to apply.

The Memorandum of Association further provided that the promoters should receive 7,500 fully paid up shares, but these shares were in fact never allotted.

The Articles of Association provided that every Director should be a holder of at least 100 shares.

Subsequently to its formation, as above, one of the promoters was appointed Director of the Company, basing his qualification on his claim to the unallotted shares above mentioned.

Machinery was purchased for the purpose of carrying on the necessary mining operations, but before anything was done it was

found that the information on which the prospectus was issued was incorrect, and the claims specified in the prospectus were never transferred to the Company. The machinery was accordingly sold, and the only object which the Company proposed to effect by continuing in existence was to prosecute an action against the Northern Territory promoters for fraudulent misrepresentation. More than one year had elapsed between the time when the Company was first started and the filing of the petition for compulsory liquidation.

Held—1. That the 15,000 shares had never been *bona fide* subscribed for, and the Company, therefore, never legally formed.

2. That the appointment of the promoter as Director was a nullity, he not possessing the necessary qualification.

3. That assuming the Company to have been properly formed, nothing substantially having been done within one year from its formation, the subject-matter (the claims mentioned in the prospectus) never having been acquired, and the only object proposed to be attained by the continuance of the Company not being one of legitimate mining enterprise, the Court would order a compulsory liquidation on the ground that it was just and equitable that the Company should be wound up.

IN THE MATTER OF THE COMPANIES ACT, 1864,
AND OF THE GOLDEN REEF MINING COM-
PANY, LIMITED, EX PARTE WARD 241

2.—*Increase of Capital—Notice—Application—Allotment Call.* A person who has applied to a Company for shares, but not paid any allotment call, though he may not be entitled to the full benefit of membership, is liable for calls.

Section 33 of the Companies Act of 1864, requiring notice of increase of capital to be given to the Registrar of Companies within fifteen days from the passing of the resolution authorising increase, is merely directory, and the giving such notice is not a condition precedent to the bringing an action for calls subsequently made.

On appeal from a Local Court, whether of full or limited jurisdiction, the ruling of the Special Magistrate need not be obtained in writing, where the superior Court can collect from the Magistrate's notes the grounds of the decision on the points of law raised at the trial.

WINN'S GOLD MINING COMPANY, LIMITED, V. WYLD. 66

3.—*Prospectus—Articles of Association—* A person placed on the register of a Company pursuant to an application made on the faith of a prospectus, is not liable to such Company for calls subsequently made if there are material discrepancies between the objects set out in such prospectus and in the Articles of Association, even though such person may not have taken any steps on being aware of such discrepancies to remove his name from the register.

The prospectus set out that "the objects for which it is proposed to form this Company are to purchase from the owner

thereof a freehold section, No. 614, in the hundred of Cavenagh, Northern Territory . . . for the purposes of gold mining, and for such other purposes as are set out in the Memorandum and Articles of Association to be adopted as hereinafter mentioned."

The Memorandum of Association set out in addition that the objects of the Company were "the prospecting, digging, &c., for gold and other minerals in the said Northern Territory; the acquisition by lease or purchase or otherwise of all lands in the said Northern Territory whereon or wherein such discoveries may be made; the working of the said section and any claims, mines, or mineral property in the said Northern Territory which may be acquired by the said Company."

On the faith of the above prospectus, the defendant applied for shares in the proposed Company, and on the formation received notice of allotment and subsequent calls, none of which were paid by him, but took no proceedings to remove his name from the register.

On action for allotment and Directors' calls.

Held.—That the defendant had never agreed to join such Company as that constituted by the Memorandum of Association, and was entitled to a verdict.

Under the above circumstances, however, the defendant having from the first been aware of the variance between the prospectus and Articles of Association, and taken no steps in the matter until the failure of the Company, the Primary Judge subsequently refused to order his name to be removed from the register of shareholders.

THE TUMBLING WATERS FREEHOLD COMPANY V. JURIET. 131

COMPANY.—1. *Increase of Capital—Articles of Association—Special General Resolution.* Before increasing the capital of the Company by the issue of additional shares, pursuant to a power contained in the Articles of Association, no special resolution authorising the alteration of the "regulations of the Company as originally framed" is necessary within the meaning of Section 12 of the Companies Act of 1864

YAM CREEK GOLD MINING COMPANY V. WADHAM. 141

—2. *Forfeiture of Shares—Articles of Association.* By resolution passed at a General Meeting of the shareholders the Directors of a Company were instructed to forfeit all shares tendered to them for forfeiture on which all calls had been paid up to date.

Pursuant to these instructions the Directors accepted forfeiture of a number of shares.

On the winding up of the Company by the Court.

Held.—That the above resolution was *ultra vires*, and that the Directors could not without the consent of every member of the Company exercise a power of forfeiting shares where no ground of forfeiture existed, and that the names of the holders of shares removed from the Register pursuant to such resolution must be

included in the list of contributories as existing members of the Company.

IN RE MATTAWARRANGALA COPPER
MINING COMPANY, LIMITED. 137

COMPENSATION MONEY.—See LANDS CLAUSES CONSOLIDATION.

COMPULSORY WINDING UP.—See COMPANIES ACT, 1864 (1)

CONSIGNEE.—*Damage—Property in Goods.* A consignee of goods, forwarded to him by an English principal, for sale on terms that consignor and consignee share profit or loss, has a sufficient property in the goods to maintain an action on the bill of lading against the carriers of such goods for injury to the same while in transit.

DAVIES V. JONES. 127

CONSTRUCTION.—See WILL.

CONSUL.—See SERVICE ON JURIES.

CURATOR OF INTESTATES ESTATES.—See EVIDENCE OF HEIRSHIP.

DAMAGE.—See CONSIGNEE.

DAMAGES.—See MEASURE OF DAMAGES.

DEBT, PROOF OF.—See DIVISION VI. OF INSOLVENT ACT, 1860.

DESCRIPTION OF ATTESTING WITNESS.—See POWER OF ATTORNEY.

DIRECTORS, QUALIFICATION OF.—See COMPANIES ACT, 1864 (1).

DISSOLUTION.—See COMPANIES ACTS.

DISTRICT COUNCILS ACT OF 1858.—1—*Order for sale of land*
—*Primary Judge—Ex parte application—Owner—Reputed owner.*
Under Section 186 of the District Councils Act of 1858 the Primary Judge has jurisdiction to order land to be sold for payment of arrears of rates, and such order may be properly made on an *ex parte* application.

Even where there is a reputed owner of the property sold, the notice of intention to sell required by the Act may properly be addressed "To all whom it may concern;" and where several distinct properties are intended to be sold it is not necessary to address a separate notice in respect of each property, but one notice only, with a schedule of the properties affected and the particulars required by the Act with regard to the same, so far as known, is sufficient.

IN THE MATTER OF THE DISTRICT COUNCILS
ACT, 1858, AND THE DISTRICT COUNCIL OF
GLANVILLE, EX PARTE JOHN HINDMARSH. 255

—2—Section 186.—*Reputed owner—Order for sale.* Section 186 of the District Councils Act of 1858 empowers the District Council, after the rates in respect of any property have been in arrear for more than two years, to publish in the *Gazette* certain notices addressed to the owner or reputed owner of the property of their intention to apply to the Court for an order for sale of the land; or, should the owner be unknown, the notice to be addressed "To all whom it may concern."

The District Councils Act also provides that all appeals against

assessments must be made within a specified time.

A was the owner of an allotment of land which had been conveyed to him by his father, but which was generally considered in the neighbourhood to belong to B. On one occasion application was made to A for rates due by him in respect of property in the same District, such application not specifying any particular allotments, but A had declined on the ground that the assessment was excessive. Subsequently, the rates having been in arrear for a lengthened period, notices as required by the Act were published in the *Gazette*, directed "To all whom it may concern," but specifying B as the reputed owner of the land in the schedule to the notice required by the Act; and pursuant to such notices, application was made to the Court and an order for sale obtained, which was subsequently set aside as irregular, and a new order granted. In the interval between the original and subsequent order A's attorney offered to pay all arrears due, which was declined, but an offer was made on behalf of the Council to withdraw the allotment on payment of all arrears and costs.

The affidavit as to reputed ownership simply set out that B was generally considered to be the owner, without stating on what grounds.

A having obtained an order *nisi* to set aside the order for sale,

Held—That A having been applied to for rates and declined to pay had deprived himself of all equity.

Quære—Whether, if A had not been so applied to, the notices would have been sufficient.

The affidavit should set out not merely the fact of reputed ownership, but also the grounds on which the same is based.

The procedure by order *nisi* in place of notice of motion was objected to, but the objection was over-ruled.

IN THE MATTER OF THE DISTRICT COUNCILS ACT, 1858,
AND IN THE MATTER OF THE DISTRICT COUNCIL
OF GLANVILLE, EX PARTE H. B. T. STRANGWAYS. 38

DIVISION VI. OF INSOLVENT ACT, 1860.—Execution by attorney—Proof of debt—Trustee—Interest—Statute of Limitations—Payment on account. In 1856 A, a merchant who had for some time previously carried on an extensive business, admitted as co-partners his two brothers and B, till then a clerk in his employ.

No new capital was introduced at the creation of the co-partnership, no balance struck, nor was anything done to enable the new firm to estimate the assets or liabilities of the old business, but such business continued to be conducted, and the liabilities of the old and new firms were from time to time indiscriminately discharged as if no change had occurred, and their course of dealing throughout appeared to assume that the new firm had adopted both the assets and the liabilities of the old.

A, as trustee for his mother, before the formation of the new firm, had collected on her account large sums of money, some of which appeared in the books as credited to her, and others to the properties whence the moneys had arisen, but without reference to A's mother as the owner of such properties. On

the establishment of the new firm no alteration whatever was made in the accounts, and the new firm continued to receive money the property of A's mother as before, and to credit it to the same accounts.

Subsequently, and shortly before the making of the assignments hereinafter referred to, the bookkeeper of the firm by the direction of A adjusted the account of A's mother, and credited to her the amounts not previously credited.

It was the custom of the firm to allow and to charge their customers interest with annual rests on the balance on current accounts, and in making up this account interest was so allowed. The result was that what previously appeared on the books as a small debit became a very large credit balance.

The apparent debit had been in part created by charging A's mother with moneys drawn by A, small sums only of which were in fact drawn for his mother's use, and with the exception of these small sums no money had been paid to A's mother within the statutory period.

The several members of the firm of A & Co. afterwards executed deeds of assignment pursuant to Division VI. of the Insolvent Act, 1860, for the benefit of their creditors, one of such deeds being executed by attorney specially appointed for that purpose. A's mother now claimed to rank as a creditor on the joint estate of the firm for the amount actually due to her and interest, irrespective of the entries appearing on the books.

Held—1. That a deed executed by an attorney specially appointed for that purpose is duly executed within the meaning of Division VI. of the Insolvent Act, 1860.

2. That by their course of dealing the new firm must be held to have adopted the account, and that A's mother could not be bound by wrongful entries made by A or any other member of the firm without her knowledge or authority.

That the mere fact of A having the entire management of the fund did not divest him of his character of a trustee and convert him into a mere agent, and that the new firm having knowledge of the trusts employed the trust-money subject to all its incidents, and that lapse of time was no bar to the claim of the *cestui que* trust against the firm.

That whether the account was considered as an ordinary mercantile one, or the firm was regarded as a trustee improperly using trust funds, A's mother was entitled to interest on the amounts from time to time to her credit with such yearly rests as were usually made in the ordinary course of the business of the firm, and that payments made to her from time to time would be presumed to have been made to her on account of the balance to her credit, so as to remove the same from the operation of the Statute of Limitations.

Semble—That the declaration of a creditor claiming under a deed of assignment made in pursuance of Division VI. of the Insolvent Act, 1860, is *prima facie* evidence of the truth of the allegations therein contained, and throws the *onus* of rebutting the same on the persons disputing the claim.

IN THE MATTER OF THE ASSIGNED ESTATE OF
PHILIP LEVI & CO., EX PARTE SARAH LEVI. 144

EASEMENTS.—See REGISTRATION ACT OF 1841.

EJECTMENT.—See REAL PROPERTY ACT OF 1861 (2) and (3).

ENDORSEMENT OF WARRANT.—See HABEAS CORPUS (1).

ENROLMENT, CERTIFICATE OF.—See POWER OF ATTORNEY.

EVIDENCE OF HEIRSHIP.—*Curator of Intestates' Estates—Order for Conveyance.* The Supreme Court has no power to order a conveyance of the real estate of an intestate, vested in the Curator of Intestates' Estates, to one claiming to be heir-at-law, even though no adverse claims be set up, until the question of heirship has been tried by a jury, and the proper course for such claimant is to establish his title in an action of ejectment, or by proceedings in Equity, when an issue would be directed.

Affidavits in support of any proceedings before the Supreme Court in its Testamentary jurisdiction must, since the Act No. 11 of 1867, be headed "In the Supreme Court, Testamentary Causes Jurisdiction," and affidavits not so headed cannot be admitted as evidence in such proceedings.

IN RE JAMES WHITTAKER, DECEASED. 45

EXECUTION BY ATTORNEY.—See DIVISION VI. OF INSOLVENT ACT, 1860.

— — — — SALE BY BAILIFF UNDER.—See LOCAL COURTS ACT, 1860.

EXEMPTION FROM SERVICE ON JURIES —See SERVICE ON JURIES.

EX PARTE APPLICATION.—See DISTRICT COUNCILS ACT, 1858 (1).

FAILURE TO PROSECUTE OBJECTS FOR WHICH FORMED.—See COMPANIES ACT, 1864 (1).

FALSE IMPRISONMENT.—See POLICE ACT, 1869-70.

FL. FA.—See REAL PROPERTY ACT, 1861 (5).

FORFEITURE OF SHARES.—See COMPANY (2).

FRAUDULENT APPLICATION, CERTIFICATE ISSUED PURSUANT TO.—See REAL PROPERTY ACT, 1861 (1).

HABEAS CORPUS.—1.—*Non-production of warrant—Imperial Statute 6 and 7 Vict.—Local Acts, No. 8 of 1851 and No. 16 of 1864—Offence Endorsement of Warrant.* Habeas Corpus will be granted on affidavit that, on demand by prisoner, no warrant for his detention has been produced.

An endorsement of a criminal warrant in New South Wales by a South Australian Justice resident there, and made before the person to be arrested reaches South Australia, is not such an endorsement as is contemplated by Act No. 16 of 1864, and a prisoner detained in this Province on a warrant so endorsed is entitled to be discharged.

The indictable misdemeanour within the meaning of Section 1 of Act No. 16 of 1864 need not be an indictable misdemeanour in this Province, but it is sufficient if it be so in the colony where such warrant issued.

In re J. T. H. WEST. 84

—————2.—See INSOLVENT ACT, 1860.

HEIRSHIP.—See EVIDENCE OF HEIRSHIP.

IMPERIAL STATUTE 6 AND 7 VICT.—See HABEAS CORPUS.

IMPRISONMENT, FALSE.—See POLICE ACT, 1869-70.

INCREASE OF CAPITAL.—See COMPANIES ACT, 1864 (2).

INJUNCTION ON HEARING INTERLOCUTORY.—See POLLUTION OF STREAM.

INSOLVENCY, ACT OF.—See BILL OF SALE.

INSOLVENT ACT, 1860.—1.—*Habeas Corpus—Offence - Warrant.*
The Supreme Court has power to issue a writ of *Habeas Corpus*, notwithstanding the fact that no rules have been made under Act 31 of 1855, Clause 16.

A writ of *Habeas Corpus* can be granted by a Judge to bring up a prisoner imprisoned for an offence under the Insolvent Act of 1860, such imprisonment being not merely in the nature of a qualified execution but a punishment for a criminal offence.

Where the finding of the Commissioner of Insolvency, and the warrant under which the prisoner is detained, set forth as the grounds of such detention acts, some of which do and some do not constitute substantive offences, the warrant is altogether bad, and prisoner entitled to be discharged on *Habeas* of imprisonment upon final examination.

A warrant under the Insolvent Act, 1860, under which a prisoner was detained, and the finding of the Commissioner on which such warrant was founded, set forth, amongst other things, that the prisoner did "falsely pretend," &c., but contained no allegation of his knowledge of the untruthfulness of such pretences or of any intention to defraud.

The warrant also showed, as a cause of imprisonment, other offences which were properly charged, and concluded with an order for imprisonment for a certain period as a punishment for the whole of the offences, unless the judgment debt should sooner be paid.

Held.—That no offence of false pretences was disclosed by the warrant, and that one offence being improperly charged vitiated the whole of the warrant.

Semble—That Section 125 of the Insolvent Act, 1860, does not contemplate a separate punishment for each offence.

IN RE F. W. G. FISCHER, INSOLVENT. 57

—————2.—See DIVISION VI.

INTEREST.—See DIVISION VI. OF INSOLVENT ACT, 1860.

INTERLOCUTORY INJUNCTIONS.—See POLLUTION OF STREAM.

JURIES.—See SERVICE ON JURIES.

LACHES.—See POLLUTION OF STREAM.

LANDS CLAUSES CONSOLIDATION, AND THE BURRA RAILWAY ACT, 1869.—*Tenant in Tail—Compensation Money.*
A tenant in tail in possession of land taken by the Government for railway purposes under the Lands Clauses Consolidation Act and Burra Railway Act, 1869, is entitled to the receipt of the

whole of the compensation money awarded in respect of the same.

IN THE MATTER OF THE WILL OF JAMES MASTERS,
DECEASED, AND IN THE MATTER OF THE LANDS
CLAUSES CONSOLIDATION ACT AND THE BURRA
RAILWAY ACT, 1869 54

LEASE, AGREEMENT FOR —See REAL PROPERTY ACT, 1861 (2).

— - - FOR TWO YEARS. ————— (3).

LIMITATIONS, STATUTE OF. —See DIVISION VI. OF INSOLVENT
ACT, 1860.

LOCAL ACTS Nos. 8 OF 1851 AND 16 OF 1864. —See HABEAS
CORPUS (1).

LOCAL COURTS ACT, 1860. —*Trover*—*Sale by Bailiff under execution*—*Claim of third party*—*Security*. Section 144 of the Local Courts Act, 1860, provides that where any third person shall have any claim to or in respect of any goods or chattels taken in execution under the process of any Local Court or in respect of the proceeds or value thereof, such claim shall be made before the actual sale thereof if the return of the specific goods be claimed, or if the claim be for the proceeds or value thereof, then before the amount received under the execution shall have been paid over or distributed; and thereupon it shall be lawful for the Clerk of the Court upon the application of the officer charged with the execution of such process to issue a summons.

Section 145 provides the security to be deposited by the claimant with the bailiff.

Under execution issued out of a Local Court against the goods of A the bailiff seized a horse, the property of B, which was then on A's premises. B claimed the horse before sale, but neither deposited security for the prosecution of his claim nor tendered the expense of keeping the horse.

The Bailiff proceeded to sell without reference to B's claim.

Subsequently B obtained possession of the horse and refused to deliver it to the purchaser.

In *trover* by the purchaser against B,

Held.—That the property in the horse passed by virtue of the sale, and the plaintiff was entitled to recover.

The counsel for the party at whose instance a case is reserved and whose client is unsuccessful in the Court below has the right to begin on the argument of the case.

TOTHILL V. BURNETT. 57

MEASURE OF DAMAGES. —*Goods received* “for the benefit of all concerned.” Certain bales of wool were shipped on board the defendant's barge “*Venus*” for dispatch by the ship “*Timaru*,” then loading for London.

Through the negligence of the defendant, portion of these bales became submerged on the passage, but were partially recovered through the exertions of the plaintiff's overseer who expressly stipulated that they were so to be recovered “for the benefit of all concerned.”

Some time was occupied in recovering and rendering fit for transport the submerged wool, and while the unsubmerged portion reached Goolwa, and was forwarded to London by the "*Timaru*" as originally intended, the submerged portion, or such of it as had been recovered, did not arrive in London until some months later, when a rise had taken place in the wool market. The consequence was that this recovered wool realized a higher price than that which had arrived by the "*Timaru*."

On the question of the measure of the damages—

Held—Per GWYNNE, J., and WEARING, J. (HANSON, C.J., *dissentient*)—That the plaintiffs were entitled to recover the value of the lost bales estimated at the market price of wool at Goolwa at the time when they would have arrived but for the negligence of the defendant; and that the defendant was not entitled to be credited on account with the increase of price actually realized on the recovered bales over and above what they would have realized had they arrived in due course, less the cost of recovering and re-packing the same.

MILES V. KING. 220

MURDER.—See ACT No. 9 OF 1859.

NON-PRODUCTION OF WARRANT.—See HABEAS CORPUS (1).

NOTICE.—See COMPANIES ACT, 1864 (2).

————— OF ACTION.—See POLICE ACT, 1869-70.

OFFENCE.—See HABEAS CORPUS (1).

————— INSOLVENT ACT, 1860 (1).

ONUS OF PROOF.—See POWER OF ATTORNEY.

ORDER FOR CONVEYANCE.—See EVIDENCE OF HEIRSHIP.

————— SALE.—See DISTRICT COUNCILS ACT, 1858.

OWNER—REPUTED OWNER.—See DISTRICT COUNCILS ACT, 1858.

PAYMENT ON ACCOUNT.—See DIVISION VI. OF INSOLVENT ACT, 1860.

POLICE ACT, 1869-70.—*False Imprisonment—Notice of Action.* A South Australian constable arresting a prisoner out of the Province for an offence committed within the Province is in the same position as a private person, and is not entitled to notice of action under the Police Act, 1869-70.

HODGSON V. ORR. 273

POLLUTION OF STREAM.—*Prescriptive right—Laches—Acquiescence—Interlocutory Injunctions—Injunctions on hearing.* A Bill of Complaint filed by a riparian owner, set out, amongst other things, that at a period of more than twenty years before the institution of this suit the defendant had commenced certain wool-washing operations, the effects of which were to pollute the stream of the river, but owing to the small extent of such operations the pollution had not become sensible until some six years previous to the filing of the Bill, when the plaintiff and other riparian owners had addressed a circular to the defendants requesting that steps might be taken to remedy the evils complained of, and to compensate such riparian owners for the damages sustained.

To this circular there was no reply, but for some time afterwards the nuisance considerably abated, so that the plaintiff refrained from legal proceedings until compelled to do so by a recent renewal of the pollution.

The defendant, by his answer, admitted, amongst other things, the carrying on the said trade, and averred that he had done so for a period of twenty-four years and upwards, but denied that the river had been in any way polluted by reason thereof, and also denied that there had been any diminution in the work carried on after the receipt of the circular before referred to.

The defendant also claimed a prescriptive right to the use of the water for the purposes of his said trade, and set up that the plaintiff had deprived himself of all right to relief by his *laches*.

His Honor being of opinion that the evidence established the fact that the river was wholly or in part polluted to the extent complained of by the operations of the defendant,

Held—1. That the averment of the defendant, in his answer, that the river never had been polluted by him, was inconsistent with and negatived any claim by prescription to use the same in such manner as to pollute the stream.

2. That in order to show that the plaintiff had, by his *laches*, deprived himself of his claim to relief, it would be necessary to prove, not merely that he had failed to prosecute with diligence, but that he stood by and allowed the defendant to incur expense without taking steps to prevent his so doing, and that where there is a Statute limiting the time within which proceedings might be instituted there might be acquiescence, but there would not be *laches* to deprive a party of his remedy if proceedings were taken within the statutory limit.

Principles regulating the granting of interlocutory injunctions and injunctions on hearing distinguished.

3. It is optional with, and not obligatory on the Primary Judge to postpone the granting of an injunction until questions of fact or title have been decided at law, and the Primary Judge will not so postpone except in cases of doubt.

4. It is no answer to a Bill, praying for an injunction to restrain a nuisance, that there are contributors to such nuisance not parties to the suit, unless the contributors are acting in concert with the defendant.

5. The pollution of a stream is an injury to the inheritance in respect of which one entitled in reversion to the land through which the stream flows is entitled to institute a suit in Equity, or to recover damages by action.

WHITE V. TAYLOR. 1

POWER OF ATTORNEY.—*Section of Land—Onus of Proof—Certificate of Enrolment—Description of Attesting Witness.* An attorney was duly authorised to execute all deeds necessary to complete a sale by his principal to A of a section of land, pursuant to an agreement and also to complete any further sales which he might be authorised in writing by his principal to effect.

The attorney subsequently executed a conveyance in the name of his principal to A of a section of land, but there was no written authority from his principal to the attorney to sell, nor any evidence that the section conveyed was that mentioned in the power.

Held—That the presumption was that the section so conveyed was the section referred to in the power of the attorney, and the *onus* of proving to the contrary rested on the person impeaching such conveyance.

The certificate of enrolment described the attesting witness as "Clerk of the Supreme Court of South Australia," without otherwise defining his place of abode.

Held—That the description of a person in his official capacity was a sufficient compliance with Section 21 of the Registration Act of 1841.

BRIDGART V GROOVES. 277

PREScriptive RIGHT.—See POLLUTION OF STREAM.

PRIMARy JUDGE.—See DISTRICT COUNCILS ACT, 1958.

PROOF, ONUS OF.—See POWER OF ATTORNEY.

PROPERTy IN GOODS.—See CONSIGNEE.

PROSPECTUS.—See COMPANIES ACT, 1864. (3)

QUALIFICATIONS OF DIRECTORS.—See COMPANIES ACT, 1864. (1)

REAL PROPERTy ACT, 1861.—I—*Certificate issued pursuant to Fraudulent Application.* M, the eldest son of a deceased registered proprietor, fraudulently applied in the name of his father to have certain lands brought under the provisions of the Real Property Act, 1861, stating in his declaration in support, amongst other things, that he was not aware of any mortgage other than set forth and stated as follows:—"That K lent to me the sum of £250 sterling on the security of the said piece of land, and that I have agreed to execute and register a Mortgage for the said sum to the said K or to whom he may desire.

A Certificate of Title was accordingly issued in the name of the deceased proprietor, and on the date when the same was issued, M executed in the name of the deceased a Memorandum of Mortgage to Der Deutsche Club to secure the sum of £250 and interest, presumably the same sum expressed in the application to have been advanced by K.

On bill filed to set aside the Certificate and Mortgage,

Held—That the Lands Titles Commissioners had no power under the circumstances to issue the Certificate of Title in the name of a dead man. That such Certificate was, therefore, a nullity; and that the Mortgage, being based on the Certificate, fell with it.

That neither the heir-at-law of the testator, the executors of his will, the Registrar-General, nor the Lands Titles Commissioners, were necessary parties to the above suit.

That the Court of Equity has concurrent, if not sole jurisdic-

tion in cases of fraud arising out of the Real Property Act of 1861.

BRADY V. BRADY. 219

2—*Ejectment—Agreement for Lease—Tenancy from year to year.* In ejectment by the registered proprietor of land under the Real Property Act, the defendant set up that he had entered into possession by virtue of a verbal agreement for a lease of ten years from the former registered proprietor, and that by virtue of such agreement he became tenant from year to year, and was entitled to six months' notice, expiring at the time of year when his tenancy began.

Held—following *Manning v. Crossman*—That the defendant showed no estate or interest in the land valid against the unenumbered certificate of the registered proprietor.

TRANTER V. LORD. 81

3—*Ejectment—Lease for two years—Registration.* A, the registered proprietor of certain land under the provisions of the Real Property Act, 1861, by a document in the form prescribed by the Act, duly executed but not registered, purported to let the same to B for two years, with a right of purchase.

B subsequently became insolvent, but for some time after his insolvency continued in possession of the land, and paid rent to A.

In ejectment by A against B,

Held—Per WEARING, J.—That the provisions of the Real Property Act, 1861, regulating the making and registration of leases, do not apply to leases for less than three years, and such leases can therefore be created as at Common Law, orally or by writing, and without registration.

Per GWYNNE, J.—following *Manning v. Crossman*—That a lease for less than three years of land under the provisions of the above Act cannot be registered, and cannot therefore be created, registration being essential to every dealing with any interest in land under such Act.

Per HANSON, C.J.—That a written demise for less than three years of land under the above Act is invalid unless in the form prescribed by the Act, and registered; but entry and payment of rent under such void demise creates as at Common Law a tenancy from year to year.

That an oral demise of land under the above Act for less than three years is good, but the term thereby created is not assignable.

BUCKETT V. KNOBBE. 86

4—See REGISTRATION ACT OF 1841.

5—*Transfer by Sheriff—Fi fa.* The Sheriff has no power to convey or transfer to the purchasers of land under the Real Property Act of 1861 sold by him by virtue of a writ of *fi fa*.

And per WEARING, J., *Quære*.—Whether he has power to sell land under that Act?

PALMER V. ANDREWS. 290

REGISTRATION ACT OF 1841.—*Real Property Act of 1861*—

Easements—Caveating capacity. In accordance with the Registration Act of 1841, priority of registration to create priority of title must be by memorial as provided by such Act; and a registration under the Real Property Act is not such a registration as to give priority over a prior unregistered instrument.

There may be rights of way and other easements existent in respect of land under the Real Property Act of 1861, though such rights of way and easements do not appear on the register or certificate of title.

The owner of an easement has no caveating power, and *semble* easements are not in any way subject to the operation of the Real Property Act.

A and B (the mortgagors) and C (the mortgagee) of a section of land by indenture duly executed, but not fully attested, granted a right of way over the same to B. Subsequently C re-conveyed to A and B without mention of the right of way, and A and B applied to have the land brought under the provisions of the Real Property Act of 1861, and a clean certificate of title in their names was accordingly issued.

The land was afterwards mortgaged by A and B, and sold by the mortgagee to the defendant but neither in the application nor in the certificate of title issued pursuant thereto, nor in any of the subsequent dealings, was any mention made of the right of way.

On action for obstructing the way,

Held—1. That there had been no registration within the meaning the Registration Act of 1841, such as to destroy the right of way vested in the plaintiffs.

2.—That the certificate of title was evidence only that the person named therein as proprietor held the land subject to such encumbrances, liens, and interests, as were notified thereon, but that easements did not come within any of these definitions, and, consequently, there might be a right of way not so notified.

LEAN V. MAURICE. 119

— — — — — See REAL PROPERTY ACT OF 1861 (3).

REPUTED OWNER.—See DISTRICT COUNCILS ACT, 1853 (1) and (2).

SALE.—See BILL OF SALE.

SALE BY BAILIFF UNDER EXECUTION.—See LOCAL COURTS ACT, 1860.

SECTION OF LAND.—See POWER OF ATTORNEY.

SECURITY.—See LOCAL COURTS ACT, 1860.

SERVICE ON JURIES.—*Consul—Exemption*—A Consul of a foreign power resident in this Province cannot by virtue of his *status* claim exemption from service on Juries under the existing Jury Act.

IN RE STANLEY. 53

- SHARES, FORFEITURE OF.—See COMPANY (2).
 ————SUBSCRIPTION FOR.—See COMPANIES ACT, 1864 (1)
 SHERIFF, TRANSFER BY.—See REAL PROPERTY ACT, 1861 (5)
 SPECIAL GENERAL RESOLUTION.—See COMPANY (1).
 STATUTE OF LIMITATIONS.—See DIVISION VI. OF INSOLVENT
 ACT, 1860.
 STREAM —See POLLUTION OF STREAM.
 SUBSCRIPTION FOR SHARES.—See COMPANIES ACT, 1864 (1.)
 TENANCY FROM YEAR TO YEAR.—See REAL PROPERTY ACT,
 1861 (2).
 TENANT IN TAIL.—See LANDS CLAUSES CONSOLIDATION.
 TRANSFER BY SHERIFF.—See REAL PROPERTY ACT, 1861 (5).
 TROVER.—See LOCAL COURTS ACT, 1860.
 TRUSTEE.—See DIVISION VI. OF INSOLVENT ACT, 1860.
 WARRANT.—See INSOLVENT ACT, 1860 (1).
 ————, ENDORSEMENT OF.—See HABEAS CORPUS (1).
 WILL.—*Construction.* A testator by his will directed that certain
 property should at the expiration of an outstanding term be sold
 and the proceeds divided amongst three grandsons; the wife of
 testator in the meantime to receive the rent payable under the
 lease, and after her death the grandsons in equal shares. The
 testator directed his executors to divide his residuary personal
 estate "equally between his four grandchildren thereinbefore
 mentioned, his two daughters, and his wife."
 As a matter of fact there were five grandchildren previously
 mentioned in the will.
 Held. First—That the property under lease before referred
 to passed to the executors.
 Second—That all the grandchildren shared in the residuary
 personalty.
 Third—That the residuary personalty was to be divided
 amongst the beneficiaries *per capita* as tenants in common.
 MOORE V. DOLAHAN. 77
 WINDING-UP COMPULSORY.—See COMPANIES ACT, 1860 (1).

Stanford Law Library



3 6105 062 523 233



